(22,908)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 115.

JOSEPH A. TANEY, TRUSTEE OF THE ESTATE OF THE MILLER PURE RYE DISTILLING COMPANY, APPELLANT,

vs.

PENN NATIONAL BANK OF READING.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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a TRANSCRIPT OF RECORD.

No. 1355.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Petitioner-Appellant,
v.
PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Filed February 12, 1910.

1 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy.

No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Certificate by Referee to the Judges.

I, Alfred Driver, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said case before me the following question arose pertinent to the said proceedings:

The petition in Bankruptcy was filed on February 3rd, 1908. The sale of the collateral held by the Penn National Bank, hereinafter referred to, was made on February 5th, 1908. The Court appointed a Receiver in Bankruptcy on February 7th, 1908. The adjudication of Bankruptcy was made February 19th, 1908, and the Trustee was appointed on March 24th, 1908.

The Penn National Bank of Reading, Pa., loaned to said Miller Pure Rye Distilling Company the sum of $2,500.00 for which the Miller Pure Rye Distilling Company made its note to the Bank, dated August 26th, 1907, payable four months after date, and it is stated in said note that there was deposited with the Bank as collateral security "the following property, to wit, 200 barrels of whiskey in the bonded warehouse of the Distilling Company at Womelsdorf, Pa., as per warehouse receipts, gaugers certificate, etc., accompanying."

2 There was no actual delivery of the whiskey or of any part of it. The note was not paid and the Bank alleges that on February 5th, 1908, it exposed to public sale "the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note" and became the purchaser of said warehouse certificates and "by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein."

The question presented is whether upon the facts stated in the opinion of the Referee and under the law the issuing of said certificates by the Miller Pure Rye Distilling Company to the Bank for said whiskey, which whiskey remained in the possession of the Miller Pure Rye Distilling Company, and it was not in any way indicated that the whiskey was pledged to the Bank, can be held to be a valid transfer to the Bank of the whiskey as a pledge, and whether the Bank is entitled to the delivery of said whiskey to it as its property as against the Trustee and creditors of the Bankrupt, the said whiskey never having been removed from the bonded warehouse of the Miller Pure Rye Distilling Company.

And the said question is certified to the Honorable the Judges for opinion thereon.

The Referee returns and files herewith:

1. Opinion and Order of the Referee.
2. Petition for review.
3. Petition of the Penn National Bank for order to deliver whiskey.
4. Answer of the Trustee to the petition for order to deliver whiskey.
5. Evidence taken before the Referee.

Dated at Philadelphia, Pa., this 24th, day of December, 1908.

ALFRED DRIVER,
Referee in Bankruptcy.

3 *Opinion and Order of Referee.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy.

No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

The Penn National Bank of Reading, Pennsylvania, has filed a petition alleging that it is

"the absolute owner and holder for value of 200 barrels of whiskey and warehouse certificates of said Miller Pure Rye Distilling Company, bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in Warehouse No. 2 of said Company."

The petitioner further alleges that it acquired the absolute ownership and title of and to said 200 barrels of whiskey in the following manner. On August 27th, 1907, the petitioner discounted for said Distilling Company a promissory note, dated August 27th, 1907, made by said Distilling Company to the order of the petitioner for $2,500.00, payable four months after date, the said Distilling Company having at the same time deposited with said Bank as collateral security for the payment of said indebtedness warehouse receipts and gaugers certificates for 200 barrels of whiskey in the Bonded Warehouse of said Distilling Company at Womelsdorf, Pennsylvania.

Upon non-payment of said note the said Bank, the petitioner, alleges that it exposed to public sale, on February 5th, 1908,
4 in the City of Reading the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note, having previously advertised said sale for several days and having given written notice by mail, on February 1st, 1909, of the time and place and purpose of said sale to said Distilling Company, and to the Attorney for the Assignee for the benefit of creditors of said Distilling Company

"and sold the same for $200.00, your petitioner having become the purchaser of said Warehouse Certificates at said price, it being the highest and best bidder and that being the highest and best price bid for the same, and your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said Warehouse Certificates and the 200 barrels of whiskey embraced therein."

The prayer of the petition is as follows:

"Your petitioner is desirous of being put into possession of the barrels of whiskey embraced in said Certificates and of withdrawing the same from said Warehouse and is ready to surrender the certificate, pay the taxes and other charges and storage required, and therefore prays that an order may be issued forthwith directed to the Trustee in Bankruptcy and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be regauged and withdrawn from said Warehouse, and requests as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner or those claiming under it, as required by it or them, upon payment of the charges and storage as required by the terms of said Certificates, and that said Trustee be restrained from interfering with the removal of said whiskey from said Storage Warehouse and premises by your petitioner, or those claiming under it."

5 Three so called certificates were issued by said Miller Pure Rye Distilling Company, all in the same form, one for 25 barrels of whiskey, one for 55 barrels of whiskey and one for 120 barrels of whiskey.

The following is a copy of one of said Certificates:

No. 5454. First District of Pennsylvania. United States Internal Revenue Distillery. Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from ourselves twenty-five (25) Barrels of Miller Pure Rye Whiskey distilled, marked and numbered as per Record Attached, Subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this Certificate, Payment of tax and other charges due thereon and storage at the rate of five cents per barrel per month from August 26th, 1907. Stored in Warehouse No. 2. Inspection Spring 1907. Serial Nos. of Packages 7964/7988.

MILLER PURE RYE DISTILLING COMPANY,
S. V. NAGLE, *President.*

Endorsed: Miller Pure Rye Distilling Co., S. V. Nagle, President. Valid only when signed by the President or Vice-President of the Company. Address all communications to Miller Pure Rye Distilling Co., Philadelphia, Pa. Special Notice. Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

A copy of said note is as follows:

6 $2,500.—

READING, PA., *August 27th*, 1907.

Four months after date I promise to pay to the order of the Penn National Bank of Reading Pa. at The Penn National Bank of Reading, in Reading, Pa. Twenty-five hundred no/100 Dollars without defalcation, for value received; having deposited with the said Bank, as collateral security, for the payment of this and any other past or future indebtedness, liability or liabilities of the undersigned to said The Penn National Bank of Reading, or the holders ther-of, due or to become due or that may hereafter be contracted, the following property, to wit: 220 bbls. whiskey in bonded Warehouse at Womelsdorf Pa., as per Warehouse Rects. gaugers' ctf. &c. accompanying the present market value of which is $— and do hereby agree to deposit forthwith with the holder of this or any other liability or liabilities of the undersigned such additional security as they may from time to time request; and, in default thereof, such liability shall at once become due and payable, as though it had actually matured; and upon default of payment at maturity, whether such maturity be according to the terms of the instrument or shall occur by default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof, for the purpose of liquidation of any liability of the undersigned and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such property, or any additions thereto, or substitutions therefor, without any previous demand, advertisement or notice either at Broker's board or public or private sale, at any time or times hereafter; with the right on the part of such holders to become the purchasers and absolute owners thereof, free of all trusts and claims.

And it is further agreed that the said property, together with
7 any previously deposited or that may be deposited or pledged hereafter, shall stand as one general continuing collateral security for any and all obligations of the undersigned, so that the deficiency on any one shall be made good from the collaterals for the others; the undersigned hereby remain responsible for any deficiency in payment, and hereby waiving all benefit or any stay of execution for any exemption of property from execution or any privilege under any law now or hereafter to be enforced.

Due —— —, ——.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *Pres't.*

The trustee answered said petition and denied that said Bank is the absolute owner of said 200 barrels of whiskey and admits that warehouse receipts were issued therefor to said Bank as collateral security for certain promissory notes named in the petition, and further avers,

"that there has been no delivery of said whiskey, or any part thereof, in any manner whatsoever, and that the said whiskey was under the exclusive control and direction of the Miller Pure Rye Distilling Company at the time of the execution of the Warehouse Receipts."

The said Distilling Company made an assignment for benefit of creditors on December 4th, 1907. The petition in Bankruptcy was filed on February 3rd, 1908. The sale of the collateral by the Penn National Bank took place February 5th, 1908. A Receiver in Bankruptcy was appointed February 7th, 1908. The adjudication of Bankruptcy was entered February 19th, 1908. The Trustee was appointed on March 24th, 1908.

The question involved, as against the Trustee is the valid-
8 ity of the pledge, or attempted pledge, of the 200 barrels of whiskey stored in the Warehouse of the Bankrupt, the Distilling Company.

The Distilling Company made its promissory note and issued certificates in the form above stated, on the strength of which the Bank as collateral loaned the sum of $2,500.00 to the Distilling Company. The certificates were delivered to the Bank, but the whiskey was not delivered to the Bank and remained in the possession and control of the Distilling Company.

There is no evidence to show that the whiskey was set apart by itself in the warehouse. There was no tag or mark of any kind on any of the barrels to indicate that the whiskey had been pledged by the Distilling Company to the Bank. There was absolutely nothing "to negative the apparent ownership of the bankrupt Company in whose possession and under whose control" the whiskey was. Nothing was done by either party at the time the note was made or afterwards to carry the pledge into effect.

The Distilling Company did not deliver the whiskey nor did the Bank mark, remove, or take possession of the 200 barrels of whiskey, or of any of them. The whiskey remained in the warehouse with

other whiskey of the Distilling Company, and was not in any way distinguished or separated from the other whiskey of the Distilling Company, or from that alleged to have been sold by the Distilling Company to other persons and remaining in the warehouse.

There was no notice posted on the inside or the outside of the warehouse, or any part of the premises of the Distilling Company that the 200 barrels of whiskey had been pledged to the Bank. This was the condition existing at the time of the sale. The sale was made at the City of Reading, some miles distant from the warehouse of the Distilling Company in which the whiskey was kept.

9 The Bank alleges in its petition that it exposed to public sale "the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note" and became the purchaser of said warehouse certificates, and "by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein."

In the case of the Millbourne Mills Company, Bankrupt 172 Fed. Rep. 177, certain grain and flour certificates were issued by the Mills Company as a collateral to loans. Each of the flour certificates stated that the Mills Company

"has stored in its warehouse, basement floor, Section A * * * 200 barrels of flour branded U, * * * which will be subject to its order and only deliverable upon the endorsement and surrender of this certificate."

The flour was stored in barrels in the basement of the Company's warehouse under the charge of the Superintendent, in three sections, divided off from each other by upright posts, and all bearing a common brand.

In the whiskey certificates no mark or brand is mentioned and none was placed on the barrels. It is true that the barrels were numbered with the serial numbers, but this does not amount to notice that these barrels of whiskey had been pledged to the Bank.

In the Millburn Mills case, supra, page 181, the Circuit Court of Appeals for the Third Circuit decided that the flour and grain certificates held by the Fourth Street National Bank could not be sustained as warehouse certificates, however they may bear that form, and says that "a man cannot make a warehouse of himself as to his own goods," and that as there was no delivery of the property there was no valid pledge.

10 Counsel for the Penn National Bank, the petitioner, who is also a Director of the Bank, testified as follows:

"the sale was had, and I purchased the collateral on behalf of the Bank for $200.00, that being the highest and best bid made at the sale. Advertisement of the sale was made in the Reading Daily Eagle. There were a number of people there but mine was the only bid. The value of the whiskey is greater than $200.00, but at the sale I really did not know whether there was one barrel there, or whether there were two hundred barrels there. At that time it was known that different people were claiming the same whiskey, and

when I bid $200.00 for this whiskey I did not know whether it was a loss or not. I paid it myself, and it could only be a loss as far as giving credit to the Bankrupt was concerned."

The above citation from the evidence is sufficient to show that the issuing of the so called certificates for this whiskey, which remained in the possession of the Distilling Company, cannot be regarded as making a valid transfer to the Bank of the whiskey as a pledge.

No notice was given to the Collector of Internal Revenue by the Bank or by the Distilling Company of the attempted pledge of said whiskey, and it is not proved that the name of the Bank appears on the books or documents of the Government, or of the Distilling Company, as pledgee of or having any interest whatever in said whiskey.

The sale was held on February 5th, 1908, and the Bank did not notify the Collector of the sale and did not demand delivery of the whiskey, or take any action to obtain possession of it, as its property purchased at said sale, or assert its ownership, until it filed its petition on April 23rd, 1908, one month after the appointment of the Trustee.

Speaking of the rights of the holder of the flour certificates in the Millbourne Mills case, the Circuit Court of Appeals says, page 182:

11 "To preserve the rights of such holders, as against creditors, either by way of equitable lien or pledge it had to be openly and clearly indicated that the flour was theirs, without which the mere storing of it by itself in the basement, which in effect was all that was done was of no avail."

It is clear upon the facts stated that there was no actual delivery of the whiskey. The delivery of the certificates alone without indicating that the whiskey had been pledged was not such a delivery as is essential to a valid pledge.

It is also held in the Millbourne Mills case, page- 184, 185, that a transaction intended as a pledge of property but which for want of delivery is ineffectual as a pledge does not create an equitable lien as against a trustee in bankruptcy who represents the general creditors of the pledgor.

It is contended by the Bank that inasmuch as the whiskey was stored in the bonded warehouse of the Distilling Company it was not in the custody of the borrower, and as the whiskey was in the possession of the bailee actual delivery was not required.

It is provided by Section 3274 Rev. Stat. U. S. as follows:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the Collector having control of the warehouse."

In case of U. S. v. 36 barrels of high wines, 7 Blatchford, 460, Section 29 of Act July 13, 1866 (which is similar to Section
12 3274 Rev. Stat. U. S.), was considered by the Court, which Section provided for an inspector for every distillery to take account of the materials used, and to inspect, gauge and prove the spirits distilled, and that he

"shall take charge of the bonded warehouse established for the distillery in conformity to law, and such warehouse shall be in the joint custody of such inspector and the owner thereof, his agent or superintendent."

In that case the Court said:

"Here then for the protection of the Government to guard against an evasion of the tax upon distilled spirits is interposed a Government official as a guardian and joint custodian of the warehouse. * * * The warehouse was a part of the distillery premises in the proprietorship of the Distilling Company and the spirits in question were their property. * * * The Act does not provide that the Government shall have any possession, custody or control of the spirits, but only a custody of the warehouse jointly with the owner. This gives the inspector, through his participation in the custody of the warehouse and by discharge of his duty to keep same locked when — personally present, a means of guarding against illegal removal of spirits but invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, as a consequence of his joint custody of the place where they may happen to be and he has not as a legal proposition a custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits and I have no hesitation in saying that he could maintain an action to redress any illegal interference with his possession. * * * In my judgment the owner of both warehouse and spirits has possession and custody and control
13 within the meaning of the Act even though for purposes of guardianship over the rights and interests of the Government in the tax due thereon the inspector be deemed to have a joint custody with him. * * * The officer has no legal possession, custody, or control of the spirits under that section. * * * The mere physical control of the spirits resulting from joint custody of the warehouse does not displace the legal possession of the owner of the spirits, himself in the like joint custody of the warehouse."

No effort was made by the Bank or the Distilling Company to separate from other whiskey in the warehouse or to designate in any way the 200 barrels of whiskey as pledged property. It is not shown that the Collector would not have issued a permit for such purpose. No demand was made upon the Collector for such permit. No authority construing Section 3274 Rev. Stat. U. S. has been cited to show that under that Section the owner of the whiskey, or the pledgee, could not obtain permission to enter the warehouse for the purpose of marking the barrels, or otherwise indicating that they were pledged.

It is evident, if the decision in above case is controlling that the Distilling Company was in possession of the whiskey, and that if actual delivery could not be made, it could have done all that was necessary to make a constructive or symbolical delivery.

In the case of the U. S. v. Witten, 143 U. S., 76, decided in 1892, said Section 3274 R. S. being then in force, the syllabus is:

"The stealing of spirits from a distillery warehouse by reason of the omission of the internal revenue officers to provide sufficient locks on the doors affords no defence to an action on the distiller's bond to pay the tax due on the spirits before their removal and within three years from date of entry."

14 The Supreme Court in that case says, in an opinion by Mr. Justice Gray, Page 78:

"Under the requirements of the internal revenue laws the warehouse was provided by the owner of the distillery at his own expense and on his premises and although declared to be a bonded warehouse of the United States and required to be under the direction and control of the Collector of the District and in charge of a Government storekeeper was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller and to enable him to give bond for payment of the tax on the spirits, instead of paying same at once. The Government assumed no responsibility to him for safe keeping. If he was not satisfied with the security of the warehouse he had only to take any measure consistent with the access and supervision of the revenue officers to make it more secure, or else to pay the tax and remove the spirits. The only duty which the revenue officers owed in regard to the security of the warehouse and the safe keeping of the spirits therein was to the Government and not to the defendants, and any negligence of those officers gave defendants no rights against the Government, and afforded them no excuse for not performing the obligation according to its terms."

If the deposit of the whiskey made by the distiller is solely for his benefit and the Government is concerned therein only for the payment of tax it is difficult to understand the argument that as the whiskey is in a warehouse which is in the joint custody of the Government and the distiller, the Government has such possession of it as bailee as to exclude the owner from setting apart in the warehouse certain barrels of it or all of it as property pledged and showing that the distilling company was not the unqualified owner of it.

15 The case of Keil v. Harris, decided in 1886 by the Supreme Court of Pennsylvania, reported in 5 Central Reporter 865, not reported in the State reports, is cited to show that where personal property is in the hands of the bailee a transfer by bill of sale alone is valid as against creditors of the vendor. The facts in that case are not similar to our case. That was a case of sale. The whiskey was manufactured by the order of the purchaser and was paid for in full. In the report it is stated that the documents showed that the name of the purchaser was written in the produce book of the distiller and also that in the certificate delivered to the purchasers it is stated that the whiskey was sold and transferred to the purchasers

and stored subject to their order or their account and at their risk.

It is evident from the above that the whiskey was not only sold and paid for but that it was transferred to the purchasers. This indicates that possession of the whiskey was transferred by the distillers to the purchasers and that the purchasers were not only the owners but had also been put in possession of the whiskey by the transfer of it to them by the distillers.

There is in our case no semblance of an attempt by actual or constructive delivery to put the Bank in unequivocal possession as pledgee.

It is ordered that the petition of the Penn National Bank of Reading, Pennsylvania, for an order upon the Trustee to execute such writings as may be required by law for the delivery of said whiskey and to cause the delivery of said two hundred barrels of whiskey, serial numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive, and 8159 to 8278 inclusive to said Bank, be dismissed.

Dated at Philadelphia December 16, 1909.

ALFRED DRIVER,
Referee in Bankruptcy.

16 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Petition for Review.

To Alfred Driver, Esquire, Referee in Bankruptcy:

The petition of the Penn National Bank of Reading, Pa., respectfully represents:

That it is a banking corporation incorporated under the laws of the United States of America and doing business at Reading, Pennsylvania.

That in the month of November, 1907, it presented its second amended petition amending petitions theretofore presented, to Alfred Driver, Esq., Referee in Bankruptcy to whom the proceedings upon said bankrupt estate were referred, and filed the same with him, setting forth that your petitioner is the absolute owner and holder for value of 200 barrels of whiskey and warehouse certificates of said Miller Pure Rye Distilling Company bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in warehouse No. 2, said certificates being respectively as follows: Certificate No. 5454 for 25 barrels, inspection Spring of 1907, Serial No. of Packages 7964 to 7988 inclusive, Certificate No. 5455 for 55 barrels, inspection Spring 1907, serial numbers of packages 7654 to 7658 inclusive, and 8279 to 8328 inclusive, Certificate No. 5456 for 120 barrels, inspec-

tion Spring of 1907, serial numbers of packages 8159 to 8278 inclusive, all certificates being dated Ryeland, Berks County, Pa.,
17 and said barrels being delivered only upon surrender of said certificates, payment of taxes and other charges due thereon, and storage at the rate of 5c. per barrel per month from August 26th, 1907, and that said petitioner is also the holder of the gauger's return of spirits covered by the certificates above referred to; that your petitioner acquired the absolute ownership and title of and to the said 200 barrels of whiskey and the warehouse certificates above mentioned in the following manner: On August 27th, 1907, your petitioner discounted for said Miller Pure Rye Distilling Company its promissory note in writing dated August 27th, 1907, drawn by the said Miller Pure Rye Distilling Company to the order of said petitioner for $2,500.00 payable four months after said date,—the said Miller Pure Rye Distilling Company having at the same time deposited with the said bank as collateral security for the payment of said indebtedness warehouse receipts and gauger's certificates for 200 barrels of whiskey in the bonded warehouse of said Miller Pure Rye Distilling Company at Womelsdorf, Pa., being the warehouse certificates hereinbefore mentioned, and did provide in said note and authorize and empower said bank, your petitioner upon default in payment of said note at maturity, to sell, transfer and deliver the whole or any part of the property deposited as collateral as aforesaid, without previous demand, advertisement or notice either at broker's board or at public or private sale at any time or times thereafter, with the right on the part of the holder of the said note to become the purchasers and absolute owners thereof, free of all trusts and claims, the said Miller Pure Rye Distilling Company remaining responsible for any deficiency in payment; that upon maturity of said note, the same was presented for payment where said note was made payable by its terms, but was not paid, and was thereupon duly protested and
18 notice of protest duly given. That upon the non-payment of said note, your petitioner, the holder thereof, pursuant to its terms and the authority therein conferred, exposed to public sale the warehouse certificates for said 200 barrels of whiskey deposited as collateral for said note on February 5th, 1908, having previously advertised the sale by public advertisement for several days prior thereto in the Reading Eagle and having given written notice of the time and place and purpose of said sale to said Miller Pure Rye Distilling Company and to the attorney for the assignee for the benefit of creditors of said Miller Pure Rye Distilling Company,—said notice being dated and mailed February 1st, 1908, and sold the same for $200.00 your petitioner having become the purchaser of said warehouse certificates at said price, it being the highest and best bidder and that the highest and best price bid for the same, and that your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said warehouse certificates and the 200 barrels of whiskey embraced therein; that the warehouse in which the whiskey is stored was and is under the direction and control of Internal Revenue of the First District of Pennsylvania and in charge of a storekeeper assigned thereto by the Internal Revenue Commissioner and is a bonded ware-

house under the Internal Revenue Laws of the United States. The petitioner representing that it wished to be put into the possession of the barrels of whiskey embraced in said certificates and to withdraw the same from said warehouse and was ready to surrender the said certificates, pay the taxes and other charges and storage required, prayed that an order be issued forthwith directed to the Trustee in Bankruptcy of the Miller Pure Rye Distilling Company and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be re-gauged and withdrawn from said warehouse, and requests, as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner or those claiming under it, as required by it or them, upon the payment of charges and storage, as required by the terms of said certificates, and that said trustee be restrained from interfering in the removal of said whiskey from said warehouse and premises by the petitioner or those claiming under it.

The Trustee in Bankruptcy filed an answer to said petition denying that the said bank is the absolute owner of said 200 barrels of whiskey, admits that the warehouse receipts were issued therefor to said bank as collateral security for the notes named in the petition, and further averred that there has been no delivery of said whiskey or any part thereof in any manner whatsoever, and that said whiskey was under the exclusive control and direction of the said Miller Pure Rye Distilling Company at the execution of said warehouse receipts.

Afterwards the said matter came on to be heard before Alfred Driver, Esquire, Referee in said estate and testimony was taken thereon before the said referee as well as upon other claims made by sundry other holders of other warehouse certificates for whiskey and an agreement was entered into by contending parties that the testimony taken with respect to the different claims should enure to the benefit of all parties.

And afterwards, to-wit, the 16th day of December, 1909, the said Referee made the following order upon the petition of said Penn National Bank of Reading, Pa., viz:

"It is ordered that the petition of the Penn National Bank of Reading, Pennsylvania, for an order upon the Trustee to execute such writings as may be required by law for the delivery of said two hundred barrels of whiskey, serial numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive, and 8159 to 8278 inclusive, to said Bank, be dismissed. Dated at Philadelphia, December 16, 1909. Alfred Driver, Referee in Bankruptcy."

That your petitioner claims that the warehouse certificates of the Miller Pure Rye Distilling Company mentioned in the petition of said Bank and held by it, constitute a valid pledge of the whiskey therein specified, and that the said Bank acquired a good and valid title to the same as against the Trustee in Bankruptcy of said Miller Pure Rye Distilling Company and its creditors.

Your petitioner therefore avers that said order of the Referee

dismissing the petition of the Penn National Bank, petitioner, was and is erroneous; that said Referee should have made an order granting the petition of said Bank and holding that the petitioner is entitled to the possession of said whiskey upon payment of the taxes and other charges and storage due thereon.

Your petitioner avers that the ruling and decision of said Referee and the order made thereon are erroneous.

(*a*) in the conclusions of law,

(*b*) in the finding of fact,

in that he finds,

(*c*) that the issuing of the said certificates for said whiskey cannot be regarded as making a valid transfer to the Bank of the whiskey as a pledge;

(*d*) that the delivery of the certificates alone without indicating that the whiskey had been pledged was not such a delivery as is essential to a valid pledge;

21 (*e*) that there is in this case no semblance of an attempt by actual or constructive delivery to put the Bank in unequivocal possession as pledge;

and in that he does not find,

(*f*) that inasmuch as the whiskey was stored in a United States Bonded Warehouse and in possession of the United States, it was not in the custody of the borrower, but in the possession of a bailee, and that actual delivery was not required;

(*g*) that the said whiskey being in the hands of a bailee and transfer of the said 200 barrels of whiskey by certificate endorsed and delivered to the Penn National Bank, petitioner, was good and valid as against the Trustee in Bankruptcy of the Distilling Company and its creditors;

(*h*) that the customary well-established and recognized methods of transferring title to whiskey in bond are by the use of the distiller's certificates similar in form to those held by the petitioner.

That your petitioner desires a review by the Judge of this Court of the order made by said Referee, and files this petition therefor, and it therefore prays that the error complained of and the questions of law and fact raised before the said Referee and decided by him may be certified by the said Referee to the Honorable the District Judges of this Court; that the same may be reviewed as provided by the Bankruptcy Law of 1898 and General Order XXVII, and that said court enter an order or direct the said Referee to make and enter an order holding and deciding that the pledge to the Penn National Bank of Reading, Pa., of the 200 barrels of whiskey covered by said warehouse certificates is a good and valid pledge of the same as against the Trustee in Bank-

22 ruptcy of said Distilling Company and its creditors, and that the said petitioner is the owner of a good and valid title to the same, and granting the said second amended petition of the Penn National Bank of Reading, Pa., and the prayer thereof.

And your petitioner ever prays, etc.

PENN NATIONAL BANK OF READING, PA.,
[SEAL.] By H. J. BRUMBACK, *Pres't.*

Attest:
(S'g'd) CALVIN D. MOSER,
Cashier and Sec.
(S'g'd) SNYDER & ZIEBER,
Attorneys, Reading, Pa.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, County of Berks:

I, Calvin D. Moser, Cashier of the Penn National Bank of Reading, Pa., the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements set forth in the foregoing petition are true according to the best of my knowledge, information and belief.

(Signed) CALVIN D. MOSER, *Cashier.*

Sworn to and subscribed before me this 22nd day of December, 1909.

(S'g'd) J. VICTOR GRIM,
[SEAL.] *Notary Public.*

My commission expires March 5, 1913.

23 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Second Amended Petition of Penn National Bank of Reading, Pa.

To Alfred Driver, Esquire, Referee in Bankruptcy.

The Petition of Penn National Bank of Reading, Pa., amending the petitions heretofore presented and filed in this proceeding, respectfully represents:

That it is a banking corporation incorporated under the laws of the United States of America and doing business at Reading, Pennsylvania.

That the said Miller Pure Rye Distilling Company was adjudicated a bankrupt February 19th, 1908, and on March 24th, 1908, Joseph A. Taney was on motion duly appointed trustee in bankruptcy.

That your petitioner is the absolute owner and holder for value

of 200 barrels of whiskey and Warehouse Certificates of said Miller Pure Rye Distilling Company, bearing date and issued August 26th, 1907, for said 200 barrels of whiskey stored in Warehouse No. 2, of said Company, said Certificates being respectively as follows: Certificate No. 5454 for 25 barrels, dated Ryeland, Berks County, Pa., August 26, 1907, inspection Spring of 1907, Serial Nos. of Packages 7964 to 7968 inclusive; Certificate No. 5455 for 55 barrels, dated Ryeland, Berks County, Pa., August 26th, 1907, Inspection Spring of 1907, Serial Nos. of Packages 7654 to 7658 inclusive and 8279 to 8328 inclusive; Certificate No. 5456 for 120 barrels, dated
24 Ryeland, Berks County, Pa., August 26th, 1907, Inspection Spring of 1907, Serial Nos. Packages 8159 to 8278 inclusive; said barrels being deliverable only upon surrender of the said Certificates, payment of tax and other charges due thereon, and storage at the rate of 5c. per barrel per month from August 26th, 1907. Copies of the said Certificates are hereto attached and marked Exhibits "A," "B," and "C," and the originals are submitted. Your petitioner is also the holder of the Gaugers Return of Spirits covered by the Certificates referred to.

That your petitioner acquired the absolute ownership and title of and to the said 200 barrels of whiskey and the Warehouse Certificates of said Miller Pure Rye Distilling Company above mentioned, in the following manner; on August 27th, 1907, your petitioner discounted for said Miller Pure Rye Distilling Company a promissory note in writing dated August 27th, 1907, drawn by the said Miller Pure Rye Distilling Company to the order of your petitioner, Penn National Bank of Reading, Pa., for $2,500.00, payable four months after said date,—The said Miller Pure Rye Distilling Company having at the same time deposited with said Bank as collateral security for the payment of said indebtedness, Warehouse Receipts and Gaugers' Certificates for 200 barrels of whiskey in the Bonded Warehouse of said Miller Pure Rye Distilling Company at Womelsdorf, Pennsylvania, being the said Warehouse certificates hereinbefore mentioned, and did provide in said note and did authorize and empower the said Bank, your petitioner, upon default in payment of said note at maturity, to sell, transfer and deliver the whole or any part of the property deposited as collateral as aforesaid, without previous demand, advertisement or notice, either at broker's board or at public or private sale, at any time or times there-
25 after, with the right on the part of the holder of the said note to become the purchasers and absolute owners thereof free of all trusts and claims, the said Miller Pure Rye Distilling Company remaining responsible for any deficiency in payment. Upon maturity of the said note the same was duly presented for payment where said note was made payable by its terms, but was not paid, and was thereupon duly protested and notice of protest duly given. A copy of the said note, marked "Exhibit D," is hereto attached and made a part hereof and the original is herewith exhibited. Upon the non-payment of the said note your petitioner, the holder thereof, pursuant to the terms thereof and the authority therein conferred, exposed to public sale at the Security and Realty Salesrooms in the

City of Reading, the Warehouse Certificate for said 200 barrels of whiskey deposited as collateral for said note, being the certificates above set forth, on February 5th, 1908, having previously advertised said sale by public advertisement for several days prior thereto in the Reading Eagle, a newspaper published in the City of Reading aforesaid, and having given written notice of the time and place and purpose of said sale to said Miller Pure Rye Distilling Company at its offices at Womelsdorf and at Philadelphia, Pa., respectively, and to the attorney for the Assignee for the benefit of creditors of said Miller Pure Rye Distilling Company, addressed to his office at Philadelphia, said notices being dated and mailed February 1st, 1908, and sold the same for $200.00, your petitioner having become the purchaser of said Warehouse Certificates at said price, it being the highest and best bidder and that being the highest and best price bid for the same, and your petitioner, the said Bank, by virtue of said sale became the absolute owner and holder of said Warehouse Certificates and the 200 barrels of whiskey embraced therein.

26 That the said warehouse in which said whiskey is stored, as set forth in said certificates, was and is under the direction and control of the Collector of Internal Revenue of the First District of Pennsylvania and in charge of an internal revenue storekeeper assigned thereto by the Internal Revenue Commissioner. That said warehouse is a bonded warehouse under the Internal Revenue Laws of the United States and is in charge of the storekeeper assigned thereto by the Commissioner, and under the Revenue Laws of the United States said warehouse is in the joint custody of the storekeeper and the proprietor thereof. Your petitioner is informed that under the Revenue Laws of the United States, the Trustee in Bankruptcy succeeds to the rights of the bankrupt upon entering a bond with the United States, given in the sum of $35,000, in order to qualify, and that at a meeting of creditors of said bankrupt held before the Referee on March 24th, 1908, the Trustee in Bankruptcy was authorized, empowered and directed to execute and deliver to the United States Government a bond in the sum of $35,000 as required by the Revenue Laws. Your petitioner is further informed that under the Revenue Laws of the United States said whiskey cannot be removed except upon the declaration and request of the said Trustee in Bankruptcy, evidenced by his signature at the foot of the form of notice, etc., as to spirits to be re-gauged and withdrawn from said warehouse and the signing of a desire to withdraw the same of said Trustee in Bankruptcy and request that such spirits be re-gauged, and presentation of the same to the Collector of Internal Revenue for the proper district, and the payment of taxes and other charges thereon and storage as provided by the terms of the certificates.

Your petitioner is desirous of being put into possession of the barrels of whiskey embraced in said certificates and of withdrawing the same from said Warehouse and is ready to surrender the cer-

27 tificate, pay the taxes and other charges and storage required, and therefore prays that an order may be issued forthwith

directed to the Trustee in Bankruptcy, and that said Trustee be authorized, empowered and directed to execute such notice or notices, etc., as to spirits to be regauged and withdrawn from said Warehouse, and requests, as required by the United States Internal Revenue Laws, and to deliver the same to your petitioner, or those claiming under it, was required by it or them, upon payment of the charges and storage as required by the terms of said Certificates, and that said Trustee be restrained from interfering with the removal of said whiskey from said Storage Warehouse and premises by your peti-oner, or those claiming under it.

And it will ever pray, etc.,

PENN NATIONAL BANK OF READING, PA.,
By A. J. BRUMBACH, *President.*

[Seal of Corporation.]

Attest:
CALVIN D. MOSER, *Cashier.*

STATE OF PENNSYLVANIA,
County of Berks, ss.:

Calvin D. Moser, Cashier of Penn National Bank of Reading, Pa., petitioner above, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing Petition are correct and true to the best of his knowledge, information and belief.

CALVIN D. MOSER, *Cashier.*

Sworn to and subscribed before me this 13th day of November, A. D. 1908.

[NOTARIAL SEAL.] J. VICTOR GRIM,
Notary Public.

My commission will expire March 5, 1909.

28 EXHIBIT "A".

No. 5454 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident, Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due Thereon, and Storage at the Rate of Five Cents per Barrel per month, from August 26th, 1907.

3—115

Inspection Spring 1907.
Stored in Warehouse No. 2
Serial Nos. of Packages 7964/7988

MILLER PURE RYE DISTIL-
LING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.
Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

29 EXHIBIT "B".

No. 5455 55 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves Fifty-five (55) barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Su-ject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due Thereon, and Storage at the rate of five cents per barrel per month, from August 26th 1907.
Inspection Spring 1907.
Stored in Warehouse No. 2.
7654-7658
Serial Nos. of Packages 8279-8328

MILLER PURE RYE DISTIL-
LING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.
Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

30 EXHIBIT "C".

No. 5456 120 bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August 26th*, 1907.

Received on Storage from Ourselves One hundred twenty (120) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, the Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and other Charges due thereon, and Storage at the Rate of Five Cents per Barrel per Month, from August 26th 1907

Inspection Spring 1907.
Stored in Warehouse No. 2.
Serial Nos. of Packages 8159-8278

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

Address all Communications to Miller Pure Rye Distilling Company Philadelphia, Pa.

Special Notice.—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed: Miller Pure Rye Distilling Company, S. V. Nagle President. Valid only when signed by the President or Vice President of the Company.

31 EXHIBIT "D."

$2,500. READING, PA., *August 27th*, 1907.

Four months after date I promise to pay to the order of The Penn National Bank of Reading, Pa., at The Penn National Bank of Reading, in Reading, Pa., Twenty-five hundred no/100 dollars without defalcation for value received; having deposited with the said Bank as collateral security for the payment of this and any other past and future indebtedness, liability or liabilities of the undersigned to the said The Penn National Bank of Reading, or the holders thereof, due or to become due or that may hereafter be contracted, the following property, to wit: 200 bbls. whiskey in bonded warehouses at Womelsdorf, Pa., as per Warehouse Rects. gauger's ctf. &c. accompanying, the present market value of which is $— and do hereby agree to deposit forthwith with the holder of this or any other liability or liabilities of the undersigned such additional

security as they may from time to time request; and, in default thereof, such liability shall at once become due and payable, as though it had actually matured; and upon default of payment at maturity, whether such maturity be according to the terms of the instrument or shall occur by default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof, for the purpose of liquidation of any liability of the undersigned and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such property, or any additions thereto, or substitutions therefor, without any previous demand, advertisement or notice either at Broker's board or public or private sale at any time, or times hereafter; with the right on the part of such holders to become the purchasers and absolute owners
32 thereof, free of all trusts and claims. And it is further agreed that the said property, together with any previously deposited or that may be deposited or pledged hereafter, shall stand as one general continuing collateral security for any and all obligations of the undersigned, so that the deficiency on any one shall be made good from the collaterals for the others; the undersigned hereby remaining responsible for any deficiency in payment, and hereby waiving all benefit of any stay of execution or any exemption of property from execution or any privilege under any law now or hereafter to be in force.

Due —— —.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *Pres't.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In re MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

To Alfred Driver, Esq., Referee in Bankruptcy:

The amended answer of Joseph A. Taney, trustee, to the second amended petition of the Penn National Bank of Reading, Pennsylvania, respectfully avers as follows:

That it is not true that the Penn National Bank of Reading is the absolute owner of two hundred barrels of whiskey in the Warehouse of the Miller Pure Rye Distilling Co. although your respondent admits that warehouse receipts were issued therefor to said bank as collateral security for certain promissory notes named in the first amended petition.

33 Your respondent further avers that the said whiskey at the time of said sale was of the value of fifty-five cents per gallon in the open market free and discharged of all Revenue taxes and other charges, and that a sale under favorable conditions would have produced at least that price.

Your respondent further avers that there has been no delivery of the said whiskey or any part thereof in any manner whatsoever

and that the said whiskey was under the exclusive control and direction of the Miller Pure Rye Distilling Company at the time of the execution of the warehouse receipt.

(S'g'd) JOSEPH A. TANEY, *Trustee.*

EASTERN DISTRICT OF PENNSYLVANIA, ss:

Joseph A. Taney being duly sworn according to law deposes and says that he is the above named respondent and that the facts above set forth are true.

(S'g'd) JOSEPH A. TANEY.

Sworn to and subscribed before me this 4th day of December, A. D. 1908.

(S'g'd) ALFRED DRIVER,
Referee in Bankruptcy.

34 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

Re MILLER PURE RYE DISTILLING CO.

Certificate of Referee.

MCPHERSON, *District Judge:*

This dispute presents an important and interesting question—What effect should be given to the pledge of a storage receipt covering packages of whiskey in a distiller's bonded warehouse? The creditors' petition was filed on Feb. 3, 1908, and if the whiskey was property which the bankrupt could have transferred by any means before that date, or which might have been levied upon and sold under judicial process against the company, the trustee afterwards acquired the title that might thus have been transferred, or been levied upon and sold at judicial sale. If the pledge of the receipts pledged the whiskey, the trustee's title is subordinate; otherwise, the adjudication gave him the complete ownership. The relevant facts are as follows:

On August 27, 1907, the Penn National Bank of Reading, Pa., lent $2,500 to the bankrupt, a corporation then engaged in distilling whiskey at Ryeland, or Womelsdorf, both names being used in the evidence. The company secured the loan by giving its note at four months, and also pledging as collateral three warehouse receipts and certain gauger's certificates covering 200 barrels of whiskey in the company's bonded warehouse. The note contains the usual collateral provisions. It states, inter alia, that the company has deposited with the bank as collateral security 200 barrels
35 of whiskey in the bonded warehouse at Womel-dorf as per warehouse receipts and gauger's certificates accompanying

the note; and in the event of default at maturity authorizes the holder to sell, transfer and deliver the whole or any part of the whiskey without any previous demand, advertisement or notice, either at public or private sale, with the right on his part to buy the property free of all trusts and claims. A copy of one of the receipts, duly endorsed by the company, is as follows:

"No. 5454. 25 Bbls.

First District of Pennsylvania United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August* 26, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whisky Distilled, Marked and Numbered as per record, attached, subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon, and storage at the rate of five cents per barrel per month, from August 26th, 1907.

Inspection Spring 1907.
Stored in Warehouse No. 2.
Serial Nos. of Packages 7964/7988.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

SPECIAL NOTICE.—Particular care should be taken of this certificate as the whiskey cannot be delivered without its surrender."

36 The gauger's certificates accompanied the receipts, and are dated between April 23 and June 1, 1907. The note was not paid at maturity, and on February 5, 1908, the bank, after advertisement and notice to the company or its representatives sold the receipts at public sale and bought them in for $200. Thereafter the bank offered to pay all taxes and charges, and asked the referee for an order, directing the trustee to take whatever steps might be required under the internal revenue laws to bring about the physical delivery of the whisky to the bank. In reply the trustee denied that the bank had become the owner, averred that no delivery had ever been made, and asserted that the whiskey was under the company's exclusive control and direction when the receipts were executed and pledged. Numerous other claims of a similar kind were presented to the referee, and much testimony was taken. By agreement all the evidence applies to all the claims, and I understand also that they will all be disposed of by the decision in the case now under discussion. The referee refused the order, holding that the trustee as the representative of the general creditors could successfully attack the pledge of the receipts—the ground of the decision being, that the whisky itself had not been validly pledged, because it had not been delivered either actualiy or constructively. The company continued therefore to be the owner, and the trustee succeeded to its title.

As already stated, the bank bought in the receipts on Feb. 5, and thus became their formal owner; but the sale was held two days after the petition in bankruptcy was filed and can have no effect upon the pending question. If the bankrupt could have transferred the whisky on Feb. 3, or if a creditor could then have sold it under judicial process, the title passed to the trustee when the adjudication was afterwards entered. For present purposes the sale on
37 Feb. 5 is not material. If the pledge of the receipts bound the property, the bank's petition should have been allowed; if failure to deliver the whisky made the pledge invalid, the subsequent sale could not give it life. What effect then did the issue and pledge of the receipts have upon the rights of general creditors? There is no doubt that the pledge was for value and was without fraud in fact, and that it was made more than four months before the petition in bankruptcy was filed. But these considerations are not decisive; if the pledge was fraudulent in law because the whisky was not delivered, either actually or constructively, the bank acquired no rights against general creditors, and has no valid claim upon the property.

Save in one respect, the case cannot be distinguished I think from Re Millbourne Mills Co., (C. C. A.) 172 Fed. 177; and unless the distinction justifies the application of a different rule, the order of the referee was right. In my opinion, however, a material difference between that case and this is to be found in the fact that the pledged property here was stored in a bonded warehouse established and maintained under the laws of the United States. It is true that the whisky did not cease to belong to the company, simply because it was stored in the warehouse. It was the product of the bankrupt's skill, labor and capital, and in no sense belonged to the government. The stringent regulations of the federal law concerning the custody of distilled spirits are intended to protect the government's right to the tax. They have no other ultimate purpose, but I think it cannot be denied that these regulations interfere so seriously with the owner's right to deal freely with the spirits, that property in such a situation should not be treated as grain and flour, for example, are treated in the warehouse of a milling company. In the case of a milling company, nothing except the convenience or the desire of the parties pre
38 vents the company from delivering possession of the grain or flour to the pledgee; and therefore, if they choose to make a contract or pledge without actual or constructive delivery of the property, they must abide the consequences. But delivery of spirits in a bonded warehouse cannot be offered by a pledgor nor accepted by the pledgee. The spirits must remain where they are until the tax is paid and the government formally permits the removal. The peculiar situation in which the federal law has placed this kind of property will appear more fully in a moment, but I may anticipate the reference to the statutes in order to say at once that in my opinion the rule now applicable is not the general rule that is so fully discussed in re Millbourne Mills Co., but the well-known exception that seems to have been announced for the first time in Pennsylvania in Linton v. Butz, 7 Pa. 89. In that case a machine was sold while it was in the hands of a third person as bailee, and the vendee did not

disturb the possession. It was afterwards levied on and sold as the property of the vendor, but the vendee recovered its value in an action of trespass against the execution creditor, the Court saying:

"* * * (To) constitute a valid assignment of personal property against an execution, there must be a delivery accompanied and followed by a continuing possession in the assignee. And where the possession does not follow as well as accompany a transfer, it is a fraud in law, without regard to the intent of the parties. It is not sufficient that the assignor gives to the assignee a delivery which may be symbolical or constructive, or a temporary delivery, and then takes the articles back into his own possession, and keeps and uses them as before. The case in hand differs in two particulars from the cases cited. Here, at the sale, the article sold was not in the possession of the vendor, but in the hands of another, as bailee; and the
39 vendor did not take it again into his own possession. Hence the property being in the hands of the bailee, the only possession was given of which it was susceptible. This is all that is required. Thus nothing is more common than a transfer by a principal of goods in the hands of a factor, and no one doubts it is a valid transfer, subject only to any lien which the factor may possess. So a transfer of goods at sea, which are in the possession of the master of a ship, is deemed a valid transfer, and if he refuse to deliver them, upon due demand and refusal, the vendee may maintain suit against him for the recovery of them or their value. In a case of bailment the property passes when the sale is completed, and no formal delivery is necessary."

Other decisions recognizing Linton v. Butz are Worman v. Kramer, 73 Pa. 385; Woods v. Hull, 81* Pa., (32 Smith) 453; Stephens v. Gifford, 137 Pa. 232; and Caulfield v. Van Brunt, 173 Pa. 433. It is true that the government was not a formal and technical bailee of the whisky, but its possession and control, were of such a character as not to be distinguishable in effect from possession and control under a bailment. Whisky in a bonded warehouse is in a peculiar situation. Usually, the title is in the distiller, and it is also true that for certain purposes he may be said to have some degree of possession, custody or control. At all events, he comes within the terms of a statute which subjects spirits to forfeiture if they be found in "the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of such taxes;" United States v. 36 Barrels of High Wines, Fed. Cases, No. 16,468, 7 Blatchford, 459. But the subject must now be approached from
a different point of view. How are the general creditors
40 of a distiller affected by the situation and surroundings of spirits belonging to him and stored in his bonded warehouse? Does the distiller appear to be the owner? Has he such apparent possession as indicates the power to dispose of the property freely? Does he obtain a false credit by seeming to have the sole right to sell or pledge? As creditors are bound to take notice of the federal

statutes governing a bonded warehouse, let us look at the provisions that are now relevant.

A distiller is required to provide at his own expense a warehouse in which nothing but spirits may be stored. The warehouse must have no doors or windows leading into the distillery or into any other room or building, and must be under the direction and control of the collector of the district, and in immediate charge of a storekeeper who is assigned to this duty by the Commissioner of Internal Revenue. In this warehouse the spirits may remain for eight years, but they may be withdrawn at any time during that period. Comp. Statutes, page 2122. If the Commissioner thinks the warehouse unsafe or unfit for use, he may require the distiller to provide another and to remove the spirits at his own expense. Ibid, 2123. The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or be opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Ibid, 2124. Any revenue officer at any hour of the day or night may enter the building to examine, gauge, measure and take account of the spirits. Heavy penalties are denounced if his attempt to enter is
41 obstructed by the distiller. Ibid, 2125. Immediately upon distillation, the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used, and regulate their brands and stamps. Ibid, 2130, 2132. A formal entry that the spirits have been deposited in the warehouse must be made with the collector, the storekeeper and the Commissioner, and a bond for the payment of the tax must accompany the entry. Ibid, 2133. Immediately after the tax has been paid, the spirits must be removed under penalty of forfeiture. Ibid, 2132. This removal is carefully guarded, and can only take place on the collector's order. Ibid, 2135-36. There are heavy penalties for removing spirits from the warehouse except as provided by law, and these penalties may be inflicted although no intent to defraud may exist. Ibid, 2136.

There are other provisions applicable to a distiller's warehouse, but these will suffice, I think, to show that in no proper sense can a distiller be said to "make a warehouse of himself as to his own goods"—to use the language of the Millbourne Mills case. He has no choice in the matter; he must provide the place of storage, must surrender control to the government's officers, and must forego the right even to enter his own building except by permission and in the presence of the storekeeper. Moreover, he may not keep the spirits in the warehouse as long as he pleases. He must give bond for the payment of the tax, but even after the tax is paid he does not thereby regain control over the spirits, so that he may keep them where they are; for as soon as the tax is paid, whether by the distiller himself or by the purchaser, they must be removed from the warehouse or be

subject to forfeiture. To treat property stored under these restrictions as if it were freely at the disposal of the owner, is I think out of the question. If the owner of flour or grain chooses to
42 sell or pledge it, no external power prevents him from making delivery; and if delivery, either actual or constructive, is not made, the public may well conclude that the ownership still accompanies the possession. But here is a species of property over which the legal owner has almost no control. As soon as he makes it, he must put it into a warehouse in the charge of a government officer. After that time he cannot even see it except by permission, and apparently he cannot mark the packages except as the law prescribes. He is liable for the tax upon it, but he cannot go on storing it after he pays the tax but must remove it without delay. The public, therefore, who only see the outside of a bonded warehouse, but are nevertheless chargeable with knowledge of the federal statutes, cannot be misled by the continued presence of the spirits. The government's complete control is well known, and the fact that the spirits remain in the warehouse is equally consistent with the distiller's title as owner, or with the tile of a buyer or pledgee. Neither buyer nor pledgee can take delivery without paying the tax, and neither is bound to make payment until actual removal is desired. At no time can it be said that the spirits are in the exclusive possession of the bankrupt. Every step even of the manufacturing process is carefully supervised by the government, and the bankrupt is never able to deliver possession of the product to a third person without violating the law. Ibid, 2120-21.

To the public, therefore, including its general creditors, a distilling company is never able to assume such appearance of prosperity as the possession of personal property ordinarily gives. Indeed, the public are excluded from the warehouse, and the quantity of spirits that are stored therein can only be a matter of conjecture. But even if the quantity should be actually known there would be little advantage in such knowledge, for the government's hand is
43 upon it all, whether the packages are many or few. It is so completely in the government's actual control and possession that it can not be levied upon by judicial process in the hands of a sheriff. This was decided in McCullough v. Large, 20 Fed. 309, by Mr. Justice Bradley and Judge Acheson, who held that whisky deposited in a bonded warehouse of the United States, and held therein for internal revenue taxes due the government, is virtually in the possession of the United States, and that a sheriff has no right to enter the warehouse and levy upon the whisky as the property of the defendant, even though the sheriff may offer to pay the tax.

But how then is this property to be dealt in? Is the owner to be debarred from deriving any benefits from it unless he can find a buyer or creditor who is ready to take immediate possession? It is well known that spirits would lose much of their value, if they could only be sold under such a restriction, and it is therefore not surprising to find that the natural expedient has been adopted, of substituting warehouse certificate or storage receipts in place of the

whisky itself. As the government is in effect a bailee, the situation is practically the same as in the case of ordinary articles deposited in a storage warehouse of the usual character. In such event the storage receipts may be freely sold or pledged, and there seems to be no good reason why similar receipts for bonded spirits should not have the same position in the markets of the country. In fact they do have this position now, unless the courts shall refuse to recognize it; for it is the unbroken custom of the trade—the evidence leaves no doubt upon this point—to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question.

In the present case there are many claimants against the
44 spirits in the bankrupt's warehouse, some putting the claim upon a pledge, most of them upon a sale, the transactions extending over the period from March, 1903, to the end of 1907. They would be greatly astonished I think to be advised that transactions three or four years old, carried out according to a well known and universally established custom, were voidable at the option of the trustee in bankruptcy because the property sold or pledged had not been physically delivered when the sale or pledge took place. And the soundness of the reason supporting such a result would be more difficult to appreciate, if such claimants were also told that their receipts were not valid because the spirits had been placed in the distiller's own warehouse, but would have been valid if the spirits had been placed in a general bonded warehouse, although in all other respects there would have been no difference between the two places of deposit. General warehouses not connected with a distillery may be established and spirits may be stored therein. 2 Comp. Stats. 2143 et seq. The regulations and restrictions of the internal revenue laws apply to these places of storage just as they apply to a distiller's own warehouse; but in the case of a general bonded warehouse there can be no doubt that the proprietor is a bailee, and that physical delivery of property in his warehouse is not necessary in order to validate a sale or a pledge. It would be difficult, I think, to justify the conclusion that delivery of storage receipts would deliver the spirits in the one case but would not deliver them in the other, since the conditions are essentially the same in both, and give equally effective, or ineffective, notice to the public.

It is of course true that unless a buyer or pledgee of storage receipts takes certain precautions—for example, gives notice to the government officials, assuming such notice to be sufficient—
45 he may be defrauded by a second sale or a second pledge of the same property. This happened in Miller v. Browarsky, 130 Pa. 372. But the possibility of such a fraud has no bearing upon the question now under consideration. There is no dispute at present between two persons, both of whom are innocent purchasers or pledgees, the question now being this; whether any innocent purchaser or pledgee of a bonded warehouse receipt can get a good title to the whisky without taking actual possession.

The decision of the referee is therefore reversed, and he is directed

to make an appropriate order under which the bank may be put into possession of the whisky in dispute.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

Decree.

And now, February 12, 1910, in conformity with the opinion filed by the court on February 10th, 1910, upon motion of Philip S. Zieber, attorney for the Penn National Bank of Reading, it is ordered, adjudged and decreed that the decision of the Referee dismissing the petition of the Penn National Bank of Reading for an order upon the Trustee to execute such writings as may be required by law for the delivery of two hundred (200) barrels of whiskey serial
46 numbers 7964 to 7988 inclusive, and 7654 to 7658 inclusive, and 8279 to 8328 inclusive and 8159 to 8278 inclusive and to cause delivery of the same is reversed, and it is further ordered that the said trustee shall execute such writings and take such steps as may be requisite to deliver or obtain delivery of the said 200 barrels of whiskey to the said Penn National Bank of Reading upon payment by said bank of the charges and storage as required by the terms of the certificates issued for said whiskey by said bankrupt.

J. B. McP.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. Cause No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY, Bankrupt.

By virtue of an order of the court made in the above matter on February 12th, 1910, it is hereby stipulated that the record to be certified to the Circuit Court of Appeals shall consist of the record that was certified to this court on December 24th, 1909, by the referee and of the opinion filed by the Hon. John B. McPherson on February 10th, 1910, and of the Decree entered thereon on February 12th, 1910.

J. H. BRINTON,
Atty. for Trustee.
SNYDER & ZIEBER,
Per J. R. S.,
Attys. for Penn National Bank.

47 In the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. No. 3021.

In the Matter of MILLER PURE RYE DISTILLING COMPANY.

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the Certificate of the Referee for review by the Court together with the papers returned therewith (other than the evidence taken before the Referee); of the Opinion of the Court filed February 10, 1910; of the Decree entered thereon February 12, 1910, as also of the Stipulation of the Parties as to what shall constitute the Record to be certified to the Circuit Court of Appeals.

[SEAL.]

WM. W. CRAIG,
Clerk District Court.

February 14, 1910.

48 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

And afterwards, to wit, on the Fifteenth day of March, 1910, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Circuit Judge, Hon. W. M. Lanning, Circuit Judge, and Hon. R. W. Archbald, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of May, 1911, come the parties aforesaid by their counsel aforesaid, and this case being again called for argument sur pleadings and briefs, before the Hon. George Gray, the Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the Nineteenth day of June, 1911, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

49 In the United States Circuit Court of Appeals for the Third Circuit.

No. 5, March Term, 1911.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Petitioner-Appellant,

v.

PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

No. 54, March Term, 1911.

ISAAC N. BOARTS, Trustee in Bankruptcy of the Foxtown Distilling Company, Appellant,

v.

J. M. SELDEN & COMPANY, Appellee.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Before Gray, Buffington, and Lanning, Circuit Judges.

GRAY, *Circuit Judge:*

These cases come before us on a rehearing. The first of them was originally argued at the March Term, 1910, and the latter at the October Term, 1910, both being appeals from decrees of the District Courts for the Eastern and Western Districts of Pennsylvania, respectively, sitting in bankruptcy. As the deter-
50 mining question was the same in both cases, they were argued together at the rehearing and will now be considered together.

As to the first case, the facts are briefly summarized from the record and the opinion of the court below, as follows: On August 27th, 1907, the Penn National Bank of Reading, Pennsylvania, loaned $2,500.00 to the Miller Pure Rye Distilling Company for which it made its note to the Bank, payable four months after date, it being stated in said note that there was deposited with the said bank, as collateral security, "the following property, to wit, 200 barrels of whiskey in the bonded warehouse of the Distilling Company at Womelsdorf, Pa., as per warehouse receipts, gaugers' certificate, etc., accompanying." This bonded warehouse was erected by the Distilling Company upon its own premises, pursuant to the requirements of the Revenue Laws of the United States, and was under the control, as hereinafter stated, of the Collector of Internal Revenue for the District.

There was no actual delivery of the whiskey, or of any part of it. The note was not paid at maturity, and on February 5th, 1908,

the Bank, after due notice exposed to public sale the warehouse certificates for said 200 barrels of whiskey, deposited as collateral for said note, and became the purchaser thereof, and claimed, by virtue of said sale, to have become the absolute owner and holder of the said 200 barrels of whiskey embraced in said certificates. On February 3rd, 1908, the creditors' petition in bankruptcy was filed against the said Distilling Company. On February 19th, 1908, said company was adjudicated a bankrupt, and on March 24th, 1908, the appellant, Joseph A. Taney, was duly appointed Trustee in Bankruptcy. Thereafter, the Bank, by its peti-
51 tion, offered to pay all taxes and charges, and asked the Referee in Bankruptcy for an order, directing the Trustee to take whatever steps might be required under the Internal Revenue Laws to bring about the physical delivery of the whiskey to the Bank. In reply, the Trustee denied that the Bank had become the owner, and averred that no delivery had ever been made, asserting that the whiskey was under the Distilling Company's exclusive control and protection when the receipts were executed and pledged. The Referee refused the order, holding that the Trustee, as the representative of the general creditors, could successfully attack the pledge of the receipts, taking the ground that the whiskey itself had not been validly pledged, because it had not been delivered either actually or constructively; that the Company, therefore, continued to be the owner, and that the Trustee succeeded to its title. A copy of one of the so-called warehouse receipts, duly endorsed by the Distilling Company to the Penn National Bank of Reading, is as follows:

"No. 5454. 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

RYELAND, BERKS CO., PA., *August* 26, 1907.

Received on storage from ourselves twenty-five (25) barrels of Miller Pure Rye Whiskey Distilled, marked and numbered as per record attached subject to our order and risk of loss or damage by fire, the elements, leakage, evaporation or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon, and storage at the rate of five cents per barrel per month, from August 26, 1907. Inspection Spring, 1907.

Stored in Warehouse No. 2, Miller Pure Rye Distilling Co., Serial Nos. of Packages, 7964/7988.

S. V. NAGLE, *President.*

SPECIAL NOTICE.—Particular care should be taken *to* this certificate as the whiskey can not be delivered without its surrender."

52 The gauger's certificates accompanied the receipts and bore dates between April 23rd and June 7th, 1907. Exceptions

being filed on behalf of the Bank to the Referee's Report, the learned Judge of the Court below, in a well considered opinion, (reported in 176 F. R. 606) reversed the order of the Referee, and directed him to make an appropriate order, under which the Bank might be put into possession of the whiskey in dispute.

As to the second case, the material facts, collected from the Report of the Special Master and the Record before us, are as follows: The Foxtown Distilling Company was a partnership owning and operating a distillery at the village of Foxtown, in Westmoreland County, Pennsylvania. For several years prior to the commencement of bankruptcy proceedings, it was engaged in the manufacture and sale of whiskey. On the distillery premises of said company, and constituting a part of it, there was erected, as in the former case, pursuant to the Revenue Laws of the United States, a bonded distillery warehouse, under the control of the Collector of Internal Revenue for the District. In this warehouse, the whiskey claimed by the appellee was entered, with other whiskey, by the Distilling Company, and received, gauged, inspected and marked by a United States gauger, who issued gauger certificates therefor to the Distilling Company.

It is not disputed that, by a transaction purporting to be one of purchase and sale, the Distilling Company sold and the appellee bought and paid for in full 410 barrels of the whiskey thus stored, between the 15th day of May, 1908, and the 12th day of
53 February, 1909, the Distilling Company delivering to the appellee vouchers or receipts therefor, with the gauger's certificates attached thereto. The general form of these so-called warehouse receipts, was the same in this as in the former case, and as in the trade generally. For want of a better name, we will refer to them hereafter as whiskey certificates or vouchers. A copy of one of them is as follows:

"Serial — Wine — Proof — Date —.

Nos.	Gal.	P. F. Gal.	Inspection.	Withdrawn.
1265	4419	100	Feb. 5, '09.	
1266	4573	"	" " "	
1267	4727	"	" 9, "	
1268	4445	"	" " "	
1269	4619	"		
Total	22783			

Gauged by A. C. Barnhart, U. S. Gauger, 23 District.
No. —. 5.

United States Internal Revenue Bonded Warehouse of Foxtown Distilling Co., No. 27, 23rd District, Pa.

YOUNGWOOD, PA., *February*, 1909.

This certifies that I have in this Distillery Warehouse Five Barrels of — Whiskey branded Foxtown Rye Whiskey. Serial Nos. 1265-

1269 inclusive and to be delivered to J. M. Selden Co. or order, or return of this Warehouse Receipt and the payment of tax and charges due thereon. Storage on said whiskey from Feb. 12-09 at 5 cents per barrel per month. Loss or damage by fire, the elements, leakage, evaporation or unavoidable accident at owner's risk. Outage guaranteed not to exceed the tariff bill of 1894.

No allowance after 7 years.

Stored in Warehouse No. — Foxtown Dist. Co. B.

L. N. JOHNSON, *Prop.*

(Endorsed:) J. M. Selden Co., J. M. Selden, Treas."

54 On June 15th, 1909, a voluntary petition in bankruptcy was presented by the partners constituting the Foxtown Distilling Company, upon which petition, on the same day, the said petitioners were adjudged bankrupts, individually and as a partnership, and an order made referring the case to the Referee for further proceedings. Also, on the same day, the appellant, Boarts, was appointed Receiver of the bankrupt's estate. On July 21st, upon the petition of the appellee, Selden & Company, a rule was granted on the Receiver to show cause why he should not deliver to the petitioner the whiskeys claimed by them under the purchase and sale hereinbefore recited. The rule was referred to the Referee, as Special Master, to take testimony and make report, and on March 28th, 1910, the Referee reported recommending that the rule be made absolute, and that the whiskey stored in the warehouse be delivered to the appellee, as the proper owner thereof, upon payment of all taxes and storage charges due thereon. This report was confirmed nisi, April 1st, 1910, by the court below, and afterwards became absolute.

The facts stated in these appeals present, in the first case, the question whether the transaction between the Miller Distilling Company and the Bank was a valid and binding pledge of the whiskey in bond as against the Trustee in Bankruptcy of the Miller Distilling Company, and, in the second case, whether the transaction between the Foxtown Distilling Company and Selden & Company, the claimant of the whiskey, was a valid and binding sale against the Trustee in Bankruptcy of the Foxtown Distilling Company. It should be premised that the records disclose that the pledge in the one case
55 and the sale in the other were for value, and without fraud in fact, and were both made more than four months before the petition in bankruptcy was filed. Assuming that it is not material that the Bank, in asserting its right as pledgee, became the owner of the articles pledged two days after the petition in bankruptcy was filed, it is not controverted that the principles applicable in both cases are the same, and are those established by the law of Pennsylvania, as to sales of personal property.

It is interesting, if not important, to observe that the laws in most, if not all, of our states, which make delivery of possession, actual or symbolical, necessary to a valid sale as against creditors of the vendor, and subsequent purchasers from him, may be referred to the sub-

stance or policy of the Statute of 13th Elizabeth, c. 5, and to the development of the policy of that statute in the decisions of the English Courts. It was a statute intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations as well of lands and tenements as of goods and chattels devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors." The alienations which it denounced as illegal, are those which are feigned and covinous and devised to the end, purpose and intent to delay, hinder and defraud creditors. That the statute referred to actual fraud, is pointed out by Lord Mansfield in Cadogan v. Kennett, Cowp. 432. He is quoted in "Benjamin on Sales," as saying that
56 "the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4." And he adds, "These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud." Benjamin says, the question of fraud is treated by the English authorities as a question of fact for the jury, even where the vendor remains in possession, although he had previously stated that the decision of Butler, J., in Edwards v. Harben, 2 T. R. 587, "That if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent," has never been overruled, and that it may be assumed that the law would be held to be the same at the present time. The learned Author concluds that the English authorities "sufficiently establish the proposition that the continued possession by the vendor of goods sold, is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se." The annotator to this learned author has grouped the decisions in a large number of states, as having adopted the English rule in this respect, and the decisions from a smaller group of states, in which Pennsylvania is included, as having adopted the rule in Edwards v. Harben, "that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent."

The significance, however, of the foregoing reference to the origin and growth of the law as to sales of personal chattels in Eng-
57 land and in this country, is that, whether retention of possession by the vendor be evidence of fraud in fact, to be submitted to the jury, or fraud in law, it is in both cases the bald, naked, and unexplained possession of the vendor that is meant. Even a bona fide retention of possession by a vendor tends to the promotion of fraud, where the natural accompaniment of a bona fide sale would be a change of physical possession from the vendor to the vendee. The policy of the law, as it has developed in England and in this country since the Statute of 13th Elizabeth, founded upon practical experience of human affairs, is embodied in the proposition that the mere retention of a physical possession, which is the ordinary accompaniment and indicium of ownership, and which the vendor can transfer to the vendee, is either prima facie evidence of fraud, or fraud per se. The very statement of this rule, however, implies

the qualifications that may be imposed upon it by the varying circumstances of particular cases. In Pennsylvania, where this rule is undoubtedly established, many such qualifications have been recognized. Such cases are, for the most part, outside the rule as above stated, rather than qualifications of or exceptions thereto.

Mr. Justice Gibson, speaking for the Supreme Court of Pennsylvania, in Clow v. Woods, 5 S. & R. 277, said:

"The Stat. 13 Eliz. does not, in words, declare a conveyance of goods fraudulent, where the vendor retains possession; but in general terms renders void all conveyances made to the end, purpose and intent of defrauding creditors. Hence, it becomes incumbent on the Courts to determine, from all the circumstances of the case, whether the conveyances be or be not made with a fraudulent intention; and in judging of that, it is held, that any neglect in leaving the
58 vendor in possession, is fraudulent within the statute. The general rule is, that the possession must be transferred to the purchaser; and to this, I propose to examine such exceptions as have been urged."

After discussing, without approval, some alleged exceptions to the rule, he says:

"It is necessary, not only that appearances should agree with the real state of things, but also, that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility to deception. * * * But I take it, where the motive of the sale is merely security to the vendee, and the owner is permitted to retain all the visible marks of ownership, for no other reason than the convenience of the parties, the contract will be void, although the reasons for the arrangement be inserted, and the possession be consistent with the deed * * * The inclination of my mind is to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining its exceptions to those cases, where, in the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by and which constituted the motive for entering into the contract. Where possession has been withheld pursu-nt to the terms of the agreement, some good reason for the arrangement beyond the convenience of the parties should appear."

In McKibben v. Martin, 64 Pa., 352, Mr. Justice Sharswood, speaking for the Supreme Court of Pennsylvania, refers to the case of Clow v. Martin (supra) as the "magna charter of our law upon this subject. The principles settled in that case have been recognised and affirmed by a bead roll of subsequent decisions which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law, wherever the subject of the transfer was capable of delivery
59 and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession." He quotes Chief Justice Gibson, as follows:

"As remarked by an eloquent writer, these Statutes of Elizabeth

produce the most beneficial effects, by placing parties under a disability to commit fraud, in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the judges who, in accordance with the spirit rather than the words, have engrafted on them such artificial presumptions and legal intendments as are ordinarily subjects of judicial construction."

The learned judge afterwards cites, by way of illustration, cases in which the law has been interpreted in accordance with its real meaning, and says:

"But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."

The spirit of these admirable statements as to the law governing sales of personal chattels in Pennsylvania, has not been departed from in subsequent decisions of the Supreme Court, but they have been applied with intelligent recognition of their philosophy to the changed conditions of business, brought about by increasing population, wealth and commercial activity. In Crawford v. Davis, 99 Pa. 576, Mr. Justice Mercur uses this language:

60 "The general rule is, that the sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. In determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties, is required."

This language is repeated in the case of Pressel v. Bice, 142 Pa. 263, and the substance thereof in many other cases. In a late case, Barlow v. Fox, 203 Pa. 114, the Supreme Court said:

"When by the action of the parties there has been a *a* separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties."

In Stephens v. Gifford, 137 Pa. 219, the Supreme Court said, what is especially noticeable in its application to the present case:

* * * the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made, was a sufficient delivery."

And in the very recent case of White v. Gunn, 205 Pa. 229, Mr.

Justice Brown has, with great clearness and full apprehension of the spirit of the law in this regard, said:

61 "What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

There are many other cases which it would be a work of supererogation to cite. It suffices to say that the law of Pennsylvania in respect of the question we are now considering is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the circumvention of fraud and deceit in sales of personal property, (which nowhere in terms refers to retention of possession by a vendor) it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud per se, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the Courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is

62 excused by the usages of the trade or business in which the sale was made. These exceptions (as they are sometimes called) to the rule, of not divorcing possession from title to personal property, are generally recognized by the courts both in this country and in England; and in Pennsylvania, the line of demarcation between the cases which do or do not fall within the rule, has been laid down by the courts with singular clearness and precision.

Tested, then, by the law of Pennsylvania, as we have stated it, what is the legal character of the transactions presented by the cases with which we are here concerned? The following facts seem to be clearly established by the records before us:

The whiskey was not so in the physical possession of the Distilling Company, as to render possible a delivery at the time that the pledge was made in the one case and the sale in the other, consistent with the avowed and fair purpose of the transaction. The facts in support of this proposition must be examined with some care, as the contrary has been contended with much force and ability.

The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury Regulations made in pursuance

thereof, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or
63 cooling vats. It requires to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax. As this involved quite a number of years, the government, for the convenience of the distiller, as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the government, by most carefully framed provisions of law
64 and regulation, takes charge of the liquor from the time it issues from the still until it is withdrawn from its custody by the distiller or owner, upon payment of the tax. These provisions of law are most minute and occupy many sections of the Revised Statutes. Of these it may be well to recite in full the following:

"SEC. 3271. Every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner.

* * * * * * *

"SEC. 3273. The storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith; and every storekeeper shall have charge of the warehouse to which he is assigned, and of such distillery, under the direction of the collector controlling the same."

"SEC. 3274. Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

Whenever, in the opinion of the Commissioner of Internal Revenue, such distillery warehouse is unsafe or unfit for use, he may discontinue such warehouse and require the merchandise
65 therein to be transferred to such other warehouse as he may designate. Such transfer shall be made under the supervision of the Collector, or such officer as may be designated by the Commissioner, and the expense thereof shall be paid by the owner of the merchandise. (Sec. 3272.) In this warehouse, spirits may remain for eight years, and they may be bottled after four years, but not before, and may be withdrawn at any time, upon the payment of the tax and charges. (Act of August 27th, 1894.) As said by the learned Judge (McPherson) of the court below, the warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened, or remain open, except in the presence of the storekeeper, or his lawfully designated representative, and no articles may be received or taken out, except by the Collector's order, addressed to the storekeeper. (Sec. 3274.) Revenue officers may, at any hour of the day or night, enter the building to examine, gauge, measure, and take account of the spirits. (Sec. 3276.) Immediately upon distillation, the spirits must be placed in a warehouse in casks or packages, as provided by law, and shall thereupon be gauged, proved and marked by an Internal Revenue Gauger, who shall cut on the cask or package containing such spirits, in a manner prescribed by the Commissioner, the quantity in wine gallons and in proof gallons of the contents of such casks or packages. The same shall be cut
66 on the head of such cask, "and the Gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the Collector of the District and the storekeeper and gauger." Written upon the stamp must be the number of proof-gallons, the name of the distiller, date of receipt in the warehouse and the serial number of each cask or package. This stamp must be signed by the United States Storekeeper and by the United States Gauger. (Sec. 3287.) As a matter either of regulation or

of practice, a gauger's voucher or certificate containing these particulars is delivered to the distiller. In the last of the cases at bar, the Master finds that the United States Gauger gave the paper certifying to the receipt, inspection, gauging and marking of the barrels of whiskey in question, and he finds in addition that there is a blank space left in this document in which may be noted withdrawals of the whiskey. The same is true also as to the certificates in the first case. It was stated without contradiction in the course of the testimony, at the trial in the latter case, that without conspiracy with the gauger, these receipts could not be duplicated. There are heavy penalties for removing spirits from the warehouse, except as provided by law, and these penalties may be inflicted, although no intent to defraud may exist.

It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouses of the United States, as above described, at the time it was pledged or sold as herein-
67 before stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out, and it seems little less than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely upon the transfer of the so-called warehouse receipts, but attached to these receipts were the Gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale of pledge was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania. No aspersion is attempted to be made of the perfect good faith ob-
taining in each case. To all the world, but especially to
68 those engaged in the business of distilling and of buying and selling whiskey, it was apparent that the physical custody and control of the whiskey here in question was not in the distiller and vendor, but in the Revenue Officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated. It was a situation created and

established by a law of the United States, of which all persons, creditors as well as others, were presumed to have had knowledge.

It is true that in these cases there had been no technical bailment of the goods sold or pledged, and some confusion of mind and embarrassment at the argument seems to have resulted from the attempt to liken the deposit of these goods in a distiller's bonded warehouse to a common law bailment, where the bailee assumes a definite duty to the bailer or his transferee. But the courts of Pennsylvania, as well as elsewhere, have not concerned themselves with technicalities, or allowed themselves to be embarrassed by the mere names of things. It does not matter whether this custody by the government's officials be classified as a bailment, or not. The real question is, whether the goods, at the time the sale and pledge were made, were out of the possession of the vendor and in the possession of another for a lawful purpose, recognized as such, not only by the vendor and vendee, but by all engaged in that business. The physical possession was not transferred, because
69 it was out of the power of the vendor to transfer the same, without the payment of a tax many times the value of the goods sold, one of the very objects of the law providing for the government's custody of the whiskey presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein.

This brings us to the not unimportant considerations, that founded upon this statute of the United States, and in promotion of its general purpose, the custom and usage, of which these records compel us to take notice, has grown up in the trade, to freely buy and sell whiskey in such bonded distillery warehouses, such sales being evidenced by the delivery of these storage certificates and so-called warehouse receipts, in lieu of the physical possession which the distiller or owner is incapable of delivering without a surrender of the privileges the statute was intended to provide. In his opinion in the Taney case, the learned judge (McPherson) of the court below finds as a fact that the evidence leaves no doubt upon the point, that it is the unbroken custom of the trade to treat these storage certificates as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question. In so far as the custom sanctions the underlying sale and purchase of whiskey thus situated, and recognizes these certificates and so-called warehouse receipts as evidence thereof, the custom is reasonable and within the philosophy of the rule which dispenses with the necessity of delivery of physical possession, where the possession is not in the vendor but in a third person for a lawful pur-
70 pose, and the non-delivery is consistent with the honest intent and object of the sale. So that, even if this custom of the trade of long continuance, and reasonable in itself, were in some particulars inconsistent with the general rule of law, but not conflicting with any settled public policy, it might settle the question in hand. From what we have said, it is apparent that it is not inconsistent with either public policy or public law in the state of Pennsylvania.

The contention has been strenuously made, that the certificates

and receipts in controversy are documents of a statutory origin, and that their force and effect involve the construction of a statute of the state of Pennsylvania. The statute referred to is the Act of September 24th, 1866, Purd. Dig. vol. 1, p. 393. It provides that "warehouse receipts given for goods, wares and merchandise * * * stored or deposited with any warehouseman, wharfinger or other person in this state * * * shall be negotiable and may be transferred by endorsement of said receipt or bill of lading; and any person to whom said receipt or bill of lading may be so transferred shall be deemed and taken to be the owner of the goods, &c., therein specified, so as to give security and validity to any lien created on the same." It further provides that "no property on which said lien may have been created shall be delivered by said warehouseman * * *, except on the surrender and cancellation of said original receipt or bill of lading."

It is plain that these provisions of the statute have to do with ordinary bailments with public warehousemen or other persons receiving goods in custody from another as a matter of business,
71 and giving receipts therefor. If this statute accomplishes anything, it is to render certain the legal character and negotiability of such warehouse receipts as it describes, and to enforce the performance of the duties undertaken by the warehousemen. The relative rights of bailor and bailee and of warehousemen in general are well established and settled by the common law. For the purposes of the transactions referred to in this statute, the bailee or warehousemen must be a third and independent person betwe-n the bailor and the purchaser or pledgee to whom the receipts are delivered. The statute does not authorize a man to become his own bailee or his own warehouseman, and the courts have frowned upon any attempt to allow him to assume that position. (Security Warehousing Co. v. Hand, 206 U. S., 415.)

In the case of Bank v. Jagode, 186 Pa. 556, Chief Justice Mitchell, speaking for the Supreme Court of Pennsylvania, of the provisions of this Act, said:

"But, in order to have this effect, the requisites of the statute must be complied with, and plainly the first of these is, that there must be a receipt issued from a bona fide warehouse * * * These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business interest and good faith of the warehouseman and the penal consequences of any breach of duty by him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors."

72 It is plain that the papers which accompanied the gauger's certificate, and which were delivered by the distiller to the pledgee or the vendee, were framed with a view of placing the pur-

chaser in a situation in which he could avail himself of the provisions of this warehouse law. But, as we have just seen, the distiller could not become his own warehouseman, and we think it must be apparent from our previous discussion of the United States Statutes in regard to distillery warehouses, that it was not intended to place the government, through its officers or agents, in the position of a warehouseman for the distiller. It is true, that by regulation or practice, the gauger's certificate is given to the distiller, but neither the gauger nor inspector assumes thereby the responsibility of a warehouseman. There is no voluntary act of bailment on the part of the distiller, nor contractual relation assumed by the officers designated to secure the revenue tax due the government. The relation between the distiller and the officers of the government in custody of his whiskey, is sui generis. It is prescribed by law and is not contractual. But a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property, as against creditors, to be made in the absence of a physical delivery of the property sold.

This court has recently, in the case of the Fourth Street National Bank v. Millbourne Mills Co., Trustee, 172 Fed. Rep. 177,
73 had occasion to consider and administer the law of Pennsylvania in regard to sales of personal property without delivery of possession. In that case as in these, the question arose between the Trustee of a bankrupt corporation, representing its creditors, and the claimant of certain goods in the hands of the trustee, under a pledge made by the bankrupt company more than four months prior to the bankruptcy. The learned counsel for the appellees in the cases now before us, has relied upon that case as supporting the contention as to the invalidity of the pledge and sale of the whiskey in question as against trustees in bankruptcy. The cases, however, are entirely different, and the facts and circumstances of the case cited will serve to illustrate and emphasize the position taken as to the cases at bar. The Millbourne Mills Company as a security for a loan from the Fourth Street National Bank, prior to the adjudication of bankruptcy, attempted to make certain pledges to the bank, of grain and flour in store at its mills. The company issued certificates after the manner of warehouse receipts, of the quantity of these commodities on hand, stating that it held them subject to its order, and endorsed the same to the bank, the property, however, remaining in the possession and under the control of the company, and there being nothing outside of the certificates to indicate the right of the certificate holders to it. The barrels of flour called for in the certificate were kept together in the company's mills, but were not segregated or marked in any other way than by occupying a certain position on the floor of one of the mills, between certain
posts. No agent or servant of the bank had any custody, con-
74 trol or supervision of this flour, nor was there anything to indicate that it differed, as to title, in any respect from other goods of the same kind in the said mill, except as above indicated.

The grain called for in the certificates was grain in certain tanks, which were constantly being filled and drawn from and refilled, as the business of the Milling Company required. It was a bald case of retention by the pledgor of the possession of goods capable of delivery, and without any reason for the non-delivery, except the convenience of the parties. By express provision of the Bankruptcy Act, the trustee is vested with the title of the bankrupt, as of the date of adjudication, to all property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against him, and as such, the grain and flour there in question was decided to be such property. In the cases at bar, however, the whiskey is so completely in the government's actual control and possession, that it cannot be levied upon by judicial process in the hands of a sheriff. This was decided in McCullough v. Large, 20 Fed. 309, by Mr. Justice Bradley and Judge Acheson. What we have already said as to the facts and circumstances of the cases at bar, indicate the difference of the two situations, and it is not necessary to further dwell upon them, after the clear and satisfactory discussion of the same by the learned judge (McPherson) of the court below.

As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit per-
75 mitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, sui generis, that, as the creditors of the distilling company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whiskey in a warehouse of which they had no means of ascertaining the contents.

Of course, there is a possibility of fraud, if a dishonest distiller, with or without collusion with a government official, makes a second sale or second pledge of the same property. But, as said by the court below, this possibility has no bearing upon the question now under consideration. There is no dispute at present between two persons, both of whom are innocent purchasers or pledgees, the question being, whether any innocent purchaser or pledgee of a bonded warehouse receipt can get a good title to the whiskey without taking actual possession.

For the reasons above stated, we are of opinion that the trustees' rights to the whiskey here in question are not superior to those of the appellees, as bona fide holders for value, prior to the adjudication of bankruptcy, and the decrees of the courts below in both cases are hereby affirmed.

Endorsed: No. 1355. Opinion of the Court. Received and Filed June 19, 1911. Saunders Lewis, Jr., Clerk.

76 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. 1355. (List No. 5.)

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Petitioner-Appellant,
vs.
PENN NATIONAL BANK OF READING, Respondent-Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

Philadelphia, June 21, 1911.

Endorsed: No. 1355. Order Affirming Decree. Received and Filed June 21, 1911. Saunders Lewis, Jr., Clerk.

77 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,
vs.
PENN NATIONAL BANK OF READING, Appellee.

Petition for Appeal from the Circuit Court of Appeals for the Third Circuit to the Supreme Court of the United States.

The above mentioned appellant, Joseph A. Taney, Trustee in Bankruptcy of the Miller Pure Rye Distilling Company, respectfully shows:

That the above entitled cause is now pending in the United States Circuit Court of Appeals for the Third Circuit, and that a judgment has been rendered therein on the 21st day of June, A. D., 1911, affirming the decree of the District Court for the Eastern District of Pennsylvania, and that the matter in controversy in said suit exceeds the sum of Two Thousand Five Hundred Dollars, ($2,500.00) besides costs;

That this cause is one in which the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit is not made final by Section 6 of the Act of Congress of March 3rd, 1891, and that

it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

78 Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Third Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And he will ever pray, &c.

(Signed) JOSEPH A. TANEY,
Trustee in Bankruptcy.

(Signed) J. H. BRINTON,
Attorney for Petitioner.

Endorsed: No. 1355. Petition for Appeal to the Supreme Court of the United States. Received and Filed, July 21, 1911. Saunders Lewis, Jr., Clerk.

79 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Order Allowing an Appeal.

And now, July 20th, A. D. 1911, it is hereby ordered that an appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

And it is further ordered that the judgment and decree of the United States Circuit Court of Appeals for the Third Circuit in said case be superseded and that execution and all further proceedings therein be stayed, pending this appeal.

(Signed) GEORGE GRAY,
Circuit Judge.

Endorsed: No. 1355. Order for Appeal to the Supreme Court of the United States. Received and Filed July 21, 1911. Saunders Lewis, Jr., Clerk.

80 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

Docket No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Respondent-Appellant,
vs.
PENN NATIONAL BANK OF READING, Petitioner-Appellee.

Assignment of Errors.

And now, July 21st, 1911, comes Joseph A. Taney, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, Respondent-Appellant, by his counsel J. H. Brinton, Esq., and respectfully represents that he feels himself to be aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause and assigns error thereto as follows:

First. The learned Court erred in entering the following order on June 21st, 1911, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,
vs.
PENN NATIONAL BANK OF READING, Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

81 This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same hereby is, affirmed with costs.

Phila., June 21st, 1911.

W. M. LANNING,
Circuit Judge.

Second. The learned Court erred in not finding and holding that the attempted pledge was fraudulent and void as to the creditors of the pledgor, and that the title of the appellant was superior to the title of the appellee.

Third. The learned Court erred in not reversing the judgment and decree of the court below.

Fourth. The learned Court erred in not finding and holding that the District Court for the Eastern District of Pennsylvania had no jurisdiction in this cause.

Fifth. The learned Court erred in not finding and holding that the United States Circuit Court for the Third Circuit had exclusive jurisdiction to hear and determine this cause.

(Signed) J. H. BRINTON,
Attorney for Appellant.

Endorsed: No. 1355. Assignment of Errors. Received and Filed July 24, 1911. Saunders Lewis, Jr., Clerk.

82 In the Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1355.

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Affidavit of Amount in Controversy.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Joseph A. Taney, Trustee in bankruptcy of the Estate of the Miller Pure Rye Distilling Company, being duly sworn according to law, deposes and says that on March 24, 1908, he was elected and subsequently duly qualified as Trustee of the said Bankrupt Estate; that on December 24th, 1909, the Penn National Bank of Reading filed in the District Court of the United States for the Eastern District of Pennsylvania, a petition to review the order of the referee dismissing a petition of the said Penn National Bank of Reading for an order upon your affiant as Trustee for the delivery of two hundred barrels of whiskey then in the possession of your affiant as said Trustee; that on February 12, 1910, the District Court of the United States for the Eastern District of Pennsylvania entered a decree reversing the decision of the said Referee and ordering your affiant to deliver said whiskey to the Penn National Bank of Reading; that on February 12th, 1910, your affiant
83 filed with the Circuit Court of Appeals for the Third Circuit a petition to revise in matters of law the decree the decision of the District Court for the Eastern District of Pennsylvania as aforesaid; that on June 21st, 1911, the said Circuit Court of Appeals affirmed the decision of the District Court of the United States for the Eastern District of Pennsylvania.

That the said Penn National Bank of Reading claimed title and right of possession to said whiskey under and by virtue of certain whiskey certificates, as more fully appears in the aforesaid petition. That the matters referred to above are in controversy in this suit, and the amount in controversy exceeds the sum of Two Thousand Five Hundred Dollars ($2,500.00), exclusive of interest and costs.

(Signed) JOSEPH A. TANEY.

Sworn and subscribed to before me this 19th day of July, 1911.

[SEAL.] WM. MEHARG LILLY,
Notary Public.

Endorsed: No. 1355. Affidavit as to Amount in Controversy. Received and Filed July 25, 1911. Saunders Lewis, Jr., Clerk.

84 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Joseph A. Taney, Trustee of The Estate of Miller Pure Rye Distilling Co., Bankrupt, Appellant, and Penn National Bank of Reading, Appellee, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this ninth day of August, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-fifth.

[United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 22,908. U. S. Circuit Court Appeals, 3d Circuit. Term No. 115. Joseph A. Taney, trustee of the estate of the Miller Pure Rye Distilling Company, appellant, vs. Penn National Bank of Reading. Filed October 13th, 1911. File No. 22,908.

2

FILED
NOV 28 1913
JAMES D. MAHER
CLERK

NO. 115 OCTOBER TERM, 1913

IN THE

Supreme Court of the United States

JOSEPH A. TANEY, TRUSTEE of the Estate of the MILLER PURE RYE DISTILLING COMPANY, Bankrupt

Appellant

vs.

PENN NATIONAL BANK OF READING

Appellee

Appeal from the United States Circuit Court of Appeals for the Third Circuit

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APPELLANT'S BRIEF

JOSEPH HILL BRINTON.
For Appellant.

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IN THE

Supreme Court of the United States

October Term, 1913. No. 115

JOSEPH A. TANEY, TRUSTEE OF THE ESTATE OF MILLER PURE RYE DISTILLING COMPANY

Appellant

vs.

PENN NATIONAL BANK OF READING

Appellee

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE AND QUESTION INVOLVED

The Miller Pure Rye Distilling Company, a corporation of the State of Pennsylvania, was engaged in distilling whiskey near Reading, Pennsylvania. The company stored its whiskey in its distillery warehouse on the premises.

On August 27, 1907, the company gave its note for four months for $2500 to the Penn National Bank of Reading, and executed and delivered to the bank, as collateral security, three so-called warehouse receipts and gauger's certificates covering 200 barrels of its own whiskey stored in its warehouse, of value considerably in excess of the face of the note. The note contained the usual collateral clause providing for sale upon default.

On December 4, 1907, the company made an assignment for the benefit of creditors. On February 3, 1908, the pres-

ent bankruptcy proceedings were instituted by the filing of a creditor's petition.

The note was not paid at maturity and the whiskey was accordingly exposed for sale and bought in by the bank on February 5, 1908.

After the Trustee in Bankruptcy was appointed the bank petitioned the Court for an order upon the Trustee to deliver to it the said whiskey. The Trustee denied the title of the bank, and upon hearing before the Referee it was held that the mere skeleton of a pledge existed and that the bank had acquired no title.

Upon appeal to the United States District Court this order was reversed, and upon appeal to the Circuit Court of Appeals, of the Third Circuit, Judges Archbald, Lanning and Buffington sitting, the District Court was reversed, Judges Archbald and Lanning holding that no title had passed upon delivery of the so-called warehouse receipts. Judge Buffington dissented and opinions by all three judges were filed. Later the Court, upon its own motion, ordered a re-argument of the case at bar and also the case of Isaac N. Boarts, Trustee in Bankruptcy, of the Foxtown Distilling Company vs. J. M. Selden & Company in appeal from the District Court of the United States for the Western District of Pennsylvania, No. 1423, Judges Gray, Lanning and Buffington sitting. The Court affirmed the District Court, Judge Gray writing the opinion.

The opinions of Judges Archbald, Lanning and Buffington are appended hereto, since they were taken out of the office of the clerk by one of the judges at the last hearing and misplaced, and do not appear on the transcript of record.

The question involved is as follows:

(a) May a distilling company manufacture and place whiskey in its own distillery warehouse and transfer title thereto upon sale or pledge, by delivery of its own receipts?

ASSIGNMENT OF ERRORS

And now, July 21st, 1911, comes Joseph A. Taney, Trustee of the Estate of Miller Pure Rye Distilling Company, Bankrupt, respondent-appellant, by his counsel J. H. Brinton, Esq., and respectfully represents that he feels himself to be aggrieved by the proceedings and decree of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause and assigns error thereto as follows:

First.—The learned Court erred in entering the following order on June 21, 1911, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 1355. March Term, 1910

JOSEPH A. TANEY, Trustee of the Estate of Miller Pure Rye Distilling Co., Bankrupt,

Appellant

VS.

PENN NATIONAL BANK OF READING,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be. and the same hereby is, affirmed with costs.

W. M. LANNING
Circuit Judge

Philadelphia, June 21, 1911

Second.—The learned Court erred in not finding and holding that the attempted pledge was fraudulent and void as to the creditors of the pledgor, and that the title of the appellant was superior to the title of the appellee.

Third.—The learned Court erred in not reversing the judgment and decree of the Court below.

Fourth.—The learned Court erred in not finding and holding that the District Court for the Eastern District of Pennsylvania had not jurisdiction in this cause.

Fifth.—The learned Court erred in not finding and holding that the United States Circuit Court for the Third Circuit had exclusive jurisdiction to hear and determine this cause.

J. H. BRINTON
Attorney for Appellant

ARGUMENT

The Miller Pure Rye Distilling Company owned a distilling plant and erected thereon a warehouse for the storage of its own product, which, from time to time, it stored therein under the supervision of the Government. The bank received a warehouse receipt for 200 barrels of the whiskey as collateral security for a loan of $2500, the receipt being in the following form:—

No. 5454. 25 bbls.

FIRST DISTRICT OF PENNSYLVANIA

UNITED STATES INTERNAL REVENUE
DISTILLERY BONDED WAREHOUSE

OF

MILLER PURE RYE DISTILLING COMPANY

Ryeland, Berks County, Pa.
August 26, 1907.

Received on storage *from ourselves* twenty-five (25) barrels of Miller Pure Rye Whiskey distilled, marked and numbered as per record attached; *subject to our order and risk* of loss or damage by fire, the elements, leakage, evaporation, or accident. Deliverable only upon surrender of this certificate, payment of tax and other charges due thereon and storage at the rate of five cents per barrel per month from August 26th, 1907, inspection Spring 1907 stored in warehouse No. 2, Serial Nos. of packages 7964/7988.

MILLER PURE RYE DISTILLING CO.
S. V. NAGLE, *President.*

Address all communications to the Miller Pure Rye Distilling Company, Philadelphia, Pa. Special Notice. Particular care should be taken of this certificate, as the whiskey *cannot be delivered without its surrender.*

The whiskey in question was placed in the distillery warehouse of the company in the usual manner, and as is shown by the warehouse receipts, the company retained physical possession and control of the whiskey and received

for its own use the charges for storage, except in so far as the Government's interest is concerned in the protection of its taxes.

The whiskey ordinarily could not be subject to the pledge in the absence of an actual or constructive delivery. It was not set apart in the warehouse, no mark or tag was placed upon it to indicate the pledge, nothing appeared on the books of the company, and no other step was taken or attempted to negative the apparent ownership of the bankrupt company in whose possession and under whose control the whiskey was when the trustee took charge. No notice was posted on the warehouse, inside or out, or on the premises, and no notice was served at the Internal Revenue office.

Where the pledge is left in the possession of the debtor, the burden of proof that there was a constructive delivery is upon the creditor claimant.

Barr vs. Reitz, 53 Pa. 256.
Hunter Construction Co. vs. Lyons, 233 Pa. 561.

Fundamental Propositions of Law

Certain rather fundamental propositions of law were considered by Judge Gray in the Court below which may be conceded to be unassailable:

Pennsylvania has adopted the English rule "that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent."

It is necessary not only that appearances should agree with the real state of things, but also that the real state of things should be honest and consistent with public policy and that it afford no unnecessary facility for deception.

Clow vs. Woods, 5 S. & R. (Pa.) 277.

Where possession has been withheld pursuant to the terms of the agreement some good reason for the arrangement besides the convenience of the parties should appear, since public policy requires change of possession.

Where the subject of the sale or pledge is in the possession of a third party as bailee, constructive delivery is sufficient.

The law of Pennsylvania controls, and the courts of that State have universally held that a man may not be his own warehouseman.

Bank vs. Jagode, 186 Pa. 556.
Moors vs. Jagode, 195 Pa. 163.
Security Warehousing Co. vs. Hand, 206 U. S. 415.
In re Millbourne Mills Co. (C. C. A.) 172 F. R. 177.

The Court below relies upon certain elements in the case at bar as constituting a constructive delivery, thereby removing it from the operation of the general rule, which may be summarized as follows:

1. The impossibility of physical delivery of the property by reason of the control thereof by the United States Government.

2. Constructive symbolical delivery by means of an alleged warehouse receipt.

3. The custom of the trade sanctioning such distillery warehouse receipts.

4. The injury to the trade which would result from declaring this custom illegal.

APPELLANT'S CONTENTIONS

Per contra, the appellant contends that—

1. Either actual delivery by payment of tax and release of the whiskey for that purpose, or constructive delivery by removal to a general bonded warehouse and delivery of its warehouse receipt, was practicable, but neither means was adopted.

2. No constructive or symbolical delivery could be or was made by the so-called warehouse receipt given to the appellee.

3. The alleged custom of the trade, being contrary to public policy, cannot be sustained.

4. Individual interests arising from such a custom must suffer the consequences when the courts hold that they exist contrary to public policy.

In the Millbourne Mills case (*supra*), the Court said:

> "The certificates admittedly cannot be sustained as warehouse receipts, however they may bear that form. A man cannot make a warehouse of himself as to his own goods."

It follows, therefore, that as a matter of public policy in the prevention of fraud, possession must accompany the conveyance. Where the goods are stored in a public warehouse, the convenience of parties, as well as public morals is served, since the warehouse receipt is given by the bailee. In the State of Pennsylvania, the courts, in coming to the conclusion that a man may not be his own warehouseman, predicated it upon public policy since the opportunity for fraud is even greater than if no semblance of a warehouse is maintained. In conducting his own warehouse the owner could issue as many fraudulent and conflicting so-called warehouse receipts as he might desire.

In *Collins' Appeal*, 107 Pa. 590, the Court said:

> "Possession of the subject of the pledge is an almost universal requirement of the law of pledge to perfect the pledgee's title. It may be dispensed with in certain cases, but the current of the authorities is that in such cases there must be a substitute for it in the way of transfer of the title in such manner that the pledgee can exercise a right of possession without any further act of the pledgor."

THE CONVENIENCE OF THE PARTIES IS NOT OF MOMENT

> "To tolerate a lien (said GIBSON, C. J. *Jenkins vs. Eichelberger*, 4 Watts, Pa. 121) severed from possession by any device whatever, would be pregnant with all the mischief of colorable ownership, and to sanction it at the expense of the community would be justified by the accomplishment of more important objects than individual accommodation."

Therefore the question here raised is whether or not a distinction exists in favor of a distillery warehouse, whereby the owner is not within the general rule that, in so far as the transfer of title to the contents is concerned, a person may not be his own warehouseman. The claim of the Bank, which was sanctioned by the District Court, was that a distillery warehouse, so far as the transfer of title is concerned, is in the custody and control of the Government, and that therefore the Government is in fact a warehouseman to whom the whiskey was bailed. Judge GRAY, of the Circuit Court of Appeals, in affirming the decision of the District Court, ratified this view by saying (Record page 40):

> "That such control (Government control) was exclusive is apparent from the provisions of the law as above pointed out, and it seems little less than ab-

surd to say that the distiller was in possession of this property when he could have been put in prison if he had attempted to take possession of it."

This view, however, disregards the purpose of the rule, and does violence to the limited power exercised by the Government.

The Real Test is One of Public Policy

The question, after all, is not what rights as to possession the owner may have exercised, as between himself and the Government, but what opportunity he had of creating secret liens to the prejudice of the innocent and credulous.

Several States of the Union, either by statute or common law, have recognized the negotiability of warehouse receipts in furtherance of commercial convenience. Goods and merchandise are deposited and the warehouse issues therefor a receipt declaring that it is the bailee of the goods specified therein and that it will deliver the same upon payment of proper charges *to the holder thereof*. The goods are kept distinct and the receipt is the *indicia* of title, and is pledged or sold as the owner may desire. In an ordinary sale or pledge the law has safeguarded the interests of the public by prohibiting secret liens and requiring the goods to be delivered or set apart and placarded sufficiently to advise the wary. The necessity for the rule ceases where the goods are placed in a warehouse, since the receipt represents the goods and without it they cannot be obtained. Therefore possession of the receipt is all important. In other words, the policy of the law may be stated to be, that in the absence of opportunity for fraud, no restriction is placed upon the free transfer of personal property. Delivery of possession is usually required so as to prevent fraud in the resale or repledging, but when stored in a warehouse the receipt becomes

the sole evidence of title and the opportunity for fraud is wanting. Where, however, the title to the goods and the title to the warehouse merge, the owner is put in a position to issue without restriction receipts for the same goods to different persons, and this was accordingly enjoined by the courts whenever the question was raised, in furtherance of public policy; and the general rule was adopted that a man may not be his own warehouseman. Putting the matter differently, the old rule requiring possession or its equivalent to accompany title was relaxed in favor of goods in warehouses because the danger of fraud was eliminated, but that relaxation did not extend beyond the reason of the rule. When the opportunity for fraud arose, the relaxation ceased.

It seems to be generally conceded, as was said by Judge McPherson in the United States District Court (Record, p. 23):

> "Save in one respect this case cannot be distinguished, I think, from *re Millbourne Mills Co.* (CCA) 172 F. R. 177, and unless the distinction justifies the application of a different rule the order of the Referee was right. In my opinion, however, a material difference between that case and this is to be found in the fact that the pledged property here was stored in a bonded warehouse established and maintained under the laws of the United States. It is true that the whiskey did not cease to belong to the company simply because it was stored in the warehouse."

As has been said, the District Court held that the Government was a bailee. Upon appeal to the Circuit Court of Appeals, Judges Archbald and Lanning held that the intervention of the Government was really a matter of the convenience of the distiller, the Government exercising a police oversight. Judge Archbald said (Appendix, p. 36):

"A building erected by a distiller on the distillery premises pursuant to the statute has none of the characteristics of a warehouse where goods are received and stored for pay, as that term is understod and applied. *Bucher vs. Commonwealth,* 103 Pa. 523. *National Bank vs. Sherer,* 225 Pa. 470. And so denominating it only results in a confusion of terms. It is nothing more or less than a place where the products of a distillery may be securely stored subject to the supervision of the officers of the Government under bond, until the taxes are paid. The arrangement is primarily for the convenience of the distiller, the spirits being allowed to age and payment of the tax meantime being deferred, the Government being protected by the bond given to the Collector, and the assignment of a storekeeper to watch it, without whom nothing can go out or in."

That Court further held that should the distiller desire to sell or pledge whiskey the Act of Congress of August 27, 1894, Sections 51 and 52, 28 Statutes, 564, afford ample relief, the effect of which will be considered hereafter, and in this opinion Judge Lanning concurred.

A Distiller May Store in a General Warehouse

If it were a fact that the distiller is required to furnish his own warehouse in which the product must be stored, it might be necessary to consider the hardship thus imposed upon the distiller in hampering the disposal of his property in comparison with public policy in countenancing the fraud which usually prevails arising out of duplication of warehouse receipts.

It is fair to assume that the Government, recognizing the imposition upon the innocent public, passed the Act of August 27, 1894, Sections 51 and 52, 28 Statutes, 564, which reads as follows:

"That the Commissioner of Internal Revenue shall be, and is hereby, authorized, in his discretion and upon the execution of such bond as he may prescribe, to establish one or more warehouses, not exceeding ten in number in any one collection district, to be known and designated as general bonded warehouses, and to be used exclusively for the storage of spirits distilled from materials other than fruit, each of which warehouses shall be in the charge of a storekeeper or storekeeper and gauger to be appointed, assigned, transferred and paid in the same manner as such officers for distillery warehouses are now appointed, assigned, transferred and paid. Every such warehouse shall be under the control of the collector of internal revenue of the district in which such warehouse is located, and shall be in the joint custody of the *storekeeper and proprietor* thereof.

Prior to the passage of this act distillers had no means of passing title to their own product without first paying the Government tax, thus relieving it of Government surveillance. By virtue of this act, however, a distiller became enabled to transfer his distilled spirits from his private warehouse to a general bonded warehouse, thus placing it in the exclusive custody of a third party, who issued a warehouse receipt therefor, which warehouse receipt became freely negotiable.

So far, therefore, as reason and justice are concerned, a distiller is in no different class from a miller. If he deposits in a general warehouse all question is eliminated, since the *proprietor* becomes the bailee *and he issues the warehouse receipts,* and opportunity for fraud is eliminated. The difference is material. If a distiller establishes his own warehouse he may issue the receipts to purchasers or pledgees for a consideration. If this is sufficient to pass title without separation of the property or notice of any kind

there is nothing to prevent the distiller from issuing any number of such receipts to any number of innocent persons who have no means, therefore, of making satisfactory inquiry. In the case of ordinary personal property a person may, upon inquiry, obtain knowledge of the title, yet the policy of the law has always been that since this too easily opens the door for fraud, possession or its equivalent must indicate title. Certainly, therefore, where inquiry is denied, *a fortiori* title could not pass. It must be conceded that the greater the Governmental restrictions the more difficult would it be for the innocent public to ascertain the truth as to title, and the more easy would it be for the crafty distiller to deceive it. This being true, it would be unconscionable to suppose that the Courts would sanction such an opportunity for fraud simply because the federal regulations require supervision for the purposes of taxation when in the absence of such regulations public policy intervenes.

The present case amply illustrates this danger. The Trustee upon taking possession found about 4000 barrels of whiskey stored in the company's warehouses in the name of the company as distiller, and warehouse receipts for over a thousand barrels of this whiskey had been sold or pledged to at least two different persons, and in some instances to four or five different persons, each of whom believed himself to be an innocent holder for value, and the fraud perpetrated was general and extensive, covering possibly thirty thousand dollars' worth of whiskey, and when it was discovered the guilty president of the company, who issued the receipts, committed suicide. If the whiskey had been stored in a general warehouse this fraud could not have been perpetrated, and surely, if the principle that public policy *to prevent fraud* requires delivery of personal property to pass title, has not been devitalized, it should be invoked in the present case. This aspect of the matter seemingly did not impress itself upon the learned District Judge, for he said (Record page 26):

"But how then is this property to be dealt in? Is the owner to be debarred from deriving any benefits from it unless he can find a buyer or creditor who is ready to take immediate possession? It is well known that spirits would lose much of their value if they could only be sold under such a restriction, and it is therefore not surprising to find that the natural expedient has been adopted, of substituting warehouse certificate or storage receipts in place of the whiskey itself. As the Government is in effect a bailee, the situation is practically the same as in the case of ordinary articles deposited in a storage warehouse of the usual character. In such event the storage receipts may be freely sold or pledged, *and there seems to be no good reason why similar receipts for bonded spirits should not have the same position in the markets of the country.*"

TRADE NECESSITY

Speaking generally, it is quite true that there is no more reason for suppressing warehouse receipts for whiskey than there is for suppressing warehouse receipts for flour and taking them out of the markets of the country, but it is equally true that there is no more reason to encourage fraud by permitting a man to issue warehouse receipts for whiskey stored in his own warehouse than there is for flour stored in a similar manner. So far as the present inquiry is concerned, it is respectfully submitted that the question is *not* what supervision the Government may or may not choose to exercise since it is done to protect the Government's right to the tax and for the convenience of the distiller. The public, therefore, is not interested and *per se* it has nothing to do with the case. *The real question is, what restrictions are placed upon the distiller that put him in a different class?* Certainly he is not coerced as to the warehouse, since he may construct his own or place the whiskey in a general bonded ware-

house at his pleasure, quite the same as any other merchant can do. If he selects the latter he forfeits the power to issue warehouse receipts, or if the former he may issue them without limit. In this he does not differ from any other merchant, especially in view of the fact that the Government recognizes only the distiller to whom he makes delivery, irrespective of the assignment of the so-called warehouse receipt.

In repetition it is vital to bear in mind that since the Court, for reasons of public policy, will not permit a man to be his own warehouseman and pass title by delivery of receipts, and thus afford an opportunity for duplication and fraud, the present inquiry seems to narrow itself down to the one question,—whether or not the supervision of the Government lessens the danger of such fraud. The District Court held that the Government is a bailee, but it is clear that in the one respect essential to prevent fraud, it is in no sense a bailee for *it does not issue or control the issue of warehouse receipts and keeps no record of change of ownership.*

But even generally speaking, the Government cannot be said to be a bailee. It issues no receipts, recognizes no transfer of title or other interest, assumes no responsibility, and is not chargeable with negligence. It lays a heavy hand upon the distiller as well as upon the product, and exacts a substantial bond, and the distiller alone is held accountable. He is permitted to construct his own warehouse on the distillery property should economy dictate, or he may make use of a general warehouse, but the vigilant eye of the law rests as constrainedly upon the distillery as it does upon the bonded product, and if for the convenience of the distiller the law should recognize an exception and permit him to pledge or convey title to the whiskey in his own warehouse, it follows as a logical conclusion that the same should extend to the plant or any part of it; yet no one would urge that simply because the Govern-

ment exercises a vigilant oversight in the enforcement of taxation, a distiller could effectually pledge the grain in the vat or any of the appliances in the distillery without placarding it or otherwise giving notice.

The Federal Government exercises the same control over the distillery as it does over the warehouse proper. The Internal Revenue Acts of the United States (Sections 3267 to 3276, 3287 to 3288, 3293, 3292 A, 3301 to 3303 of the Revised Statutes) provide for the warehouse construction and custody and control thereof by the Government. The receiving cistern and the room in which the same is placed are in charge and under the lock and seal of the Internal Revenue gauger. The locks and seals are provided by the Government, and the key is in charge of the collector and gauger. The drawing off of spirits must be under the supervision of the gauger and in the presence of the storekeeper. Very exacting provisions are required with reference to the still, the locks and seal, and generally as to the entire distillery. In short, the Government, in order to proscribe illegal distilling, exercises supervision, control, and to a certain extent, custody of the distilling plant and its accompanying warehouse from the first to the last stage of distilling, and it would be as reasonable to hold that title would pass by delivery of a bill of sale or warehouse certificate where whiskey is stored in the barrel house or other portions of the distillery plant as to hold that the title would pass where the whiskey is in the warehouse. Very similar police control exists in both instances, and the Government is undoubtedly in control.

Distillers seem as ready to respond to the temptation of fraud as any other class of persons, and the trustee is confronted with manifold difficulties in the case at bar. True it is that no fraud is thus far revealed as to the two hundred barrels of whiskey in question, but surely that cannot even tend to justify the principle of law laid down by the lower Court. If title can pass by delivery of such receipts where

there is no duplication, it must pass where there is duplication. Many persons hold different receipts for the same whiskey, they are all innocent holders for value, and must suffer for their credulity.

As to the effect of the Act of 1894, Judge ARCHBALD said (Appendix, p. 37):

> "And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place entirely separate and distinct from his own establishment where the produce of his distillery can be removed and stored in bond with the same advantage as if stored in a distillery warehouse of his own and where they may be sold or pledged by means of warehouse receipts which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name. In his own warehouse, by contrast, except only as they are in ward to the Government for payment of taxes, the goods are practically in the distiller's own hands. The storekeeper is a mere watchman to see that they do not get away and all the checks imposed and supervision provided for, are directed solely to that end. At any time, and as to any goods, the distiller may pay the tax and remove them, and there is nothing to stand in the way. No one else but the distiller, whatever his *indicia* of title, is recognized and no one but he can intervene. The statute expressly declares that the goods are in the joint custody of the Government, storekeeper and the distiller, and the Government's custody necessarily ends when the purpose of it has been subserved, leaving that of the distiller supreme. Not only is this the law, but it is the established practise as well. The goods in the distillery warehouse being thus on the premises and in the possession of the distiller, and, once the tax is paid, subject to his entire control, there is no place for a delivery, actual or constructive, necessary to complete a

pledge. In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. The authorities are clearly opposed to any such idea. As is said in *United States vs. Thirty-six Barrels*, 7 Blatch. 459,

" 'The act nowhere in terms provides that the Government Inspector shall have any possession, custody or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is given to the inspector through his participation in the custody of the warehouse and by the discharge of his duty to keep the same locked, when not personally present, as a means of guarding against illegal removal of spirits, but (it) invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits. All that the statute has done is to throw around his ownership, possession, custody and control, a surveillance and joint custody of the warehouse as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect.'

"So in *Witten vs. United States*, 143 U. S. 76, where the distiller was held liable for the tax, notwithstanding that the spirits had been stolen, it is said:

" 'Under the requirement of the Internal Revenue Laws, the warehouse was provided by the owner of the distillery at his own expense, and on his own premises, and although declared to be a bonded warehouse of the United States, and required to be under the direction and control of the collector of the district and in charge of a Government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the

spirits in the warehouse was solely for the benefit of the distillery, and to enable him to give bond for the payment of the tax on the spirits instead of paying the tax at once. The Government assumed no responsibility to him for their safe keeping.'

"The distillery warehouse, in the present instance, therefore, having none of the characteristics of a warehouse proper, and the supervision and control of the collector over the whiskey contained in it, in no sense constituting a bailment, the attempt to pledge it, by the issuing by the distiller of so-called warehouse receipts, was of no effect, no matter how specifically the property may have been described in them, nor how fully backed up by gauger's certificates they may have been. It was held in *Union Trust Company vs. Trumbull* 137 Ill. 146, that it is only as to goods in a public warehouse, that a symbolic delivery by means of warehouse receipts can be made; and that the warehouseman issuing the receipts must have the goods in his possession or control, to make the receipts amount to a delivery of the property for which they stand. And in *Conrad vs. Fisher*, 37 Mo. Appeal 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, the receipts were not good. Nor does the case of *Miller vs. Browarsky*, 130 Pa. 372, in any respect sustain the contrary view. * * * Neither is *Keil vs. Harris*, 5 Cent. Reports Pa. 865, necessarily the other way. It was assumed in that case that by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government, which as we have seen, is not so, and it is upon this mistake in assumption that the case proceeded, but, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured

it to be delivered to him, against which the plaintiff had merely an attempted levy and sale. * * *

"It is said that there is a custom in the distillery business to issue certificates against spirits under bond in distillery warehouses, by means of which they are freely sold and pledged and that serious consequences will follow if this is not upheld. When the spirits are in the warehouse proper, either such as is provided by Act of Congress, or recognized by the State law, so that it be not that of the distiller himself, such certificates no doubt are good. But where the goods are in the distiller's own hands and the attempt is made to sell or pledge them by so-called warehouse certificates or receipts, issued by the distiller alone, a custom relied on flies in the face of the law and cannot be observed. A possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom if there was nothing more. But without resting on this, the goods against which such certificates are issued, being in the distiller's own hands at the time, and (save only that the taxes must be paid) being under his complete control, there is no such delivery, either actual or constructive, by the mere putting out of receipts, as the law requires, to make an effective sale or pledge. The specification of the goods, in the same terms in which they are described in the storekeeper's or gauger's books, does not help out the receipts. It is not a matter of description, but of control, and neither does the attaching of the gauger's certificates, which are merely evidence that the goods are there. The gauger's certificates neither convey title, nor bind the goods, nor do they necessarily check the duplication of receipts. Neither gauger, storekeeper, or collector, when once the taxes have been paid, can restrain the distiller, no matter what receipts or certificates are

known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose."

Judge LANNING, concurring, said in part (Appendix page 43):

"The distiller can obtain from no other person warehouse receipts for his spirits stored in his own distillery warehouse, for there is no other person in possession of the spirits to give the receipts; but he may obtain such receipts from the proprietor or operator of a general bonded warehouse for the spirits he has stored therein, and by transferring the receipts he may make constructive delivery of the spirits therein described."

The above is a clear and careful statement of the law meriting consideration, and is, in a measure, recognized by Judge GRAY in the Court below. He there says (Record page 37):

"The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury regulations made in pursuance thereof, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or cooling vats. It requires to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this

extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before it was called upon to pay the tax. As this involved quite a number of years, the Government, for the convenience of the distiller as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the Government by most carefully framed provisions of law and regulations, takes charge of the liquor from the time it appears from the still until it is withdrawn from its custody by the distiller or owner upon payment of the tax."

Public Policy as Opposed to Individual Interest

The Government, having made ample provision for the protection of the distiller, found it was necessary to protect the public, owing to the numerous frauds practised almost generally throughout the United States by duplication of so-called warehouse receipts. In order that both the Government and the public might be protected, the Act of 1894 was passed, whereby the distiller could defer the pay-

ment of tax and permit his product to ripen, but denied to him the opportunity of preying upon the credulous public. It is therefore in furtherence both of the convenience of the distiller and the protection of the public, that warehouse receipts should be negotiable only where the whiskey is deposited in a public bonded warehouse.

With this view, however, Judge Gray takes issue and holds that under both the law of the State of Pennsylvania and of the United States *sui generis*, the free transfer of title to whiskey in distillery warehouses should be encouraged, and that public policy should give way to the convenience or advantage of individuals.

Judge Gray has urged that the practical effect of a different conclusion would be "to cripple the distilling interest by preventing the sale or pledge of product in bond."

It must be conceded, however, that a vicious practice has arisen out of convenience merely, whereby many are accommodated, but it is pregnant with opportunity for fraud, and many are deceived thereby. True, at this time, those honestly enjoying the privilege outnumber the unfortunate and innocent victims, but the fraud perpetrated is by no means insignificant. Two cases in addition to the case at bar are now pending, or have been recently decided, one in Maryland and one in Ohio (above referred to), where the cumulative fraud embraces spirits of a value exceeding one-half a million dollars. Where the fraud reaches such proportions, it is submitted that the Court should decline to countenance such an insidious practice, or indeed to *indulge in comparative equity* by saying that at this time the injury to the liquor traffic would exceed that inflicted upon unfortunate and defrauded purchasers. Such reasoning would seem to outrage that time-honored and uncompromising attitude of justice whereby public policy or welfare is so jealously safeguarded, and out of which the entire law of

personal property arose, calling forth as early as 13th Elizabeth a diatribe against secret liens on personal property, which tended "not only to let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The injury to the liquor traffic so elaborately dwelt upon by interested counsel is imaginary rather than real, and is indeed a weak support for a principle of law affording so widespread an opportunity for fraud and deceit. It is urged that the trade would be injured, and therefore the Court should countenance a practice running counter to public policy. This injury, if real, could and would be corrected by proper legislation requiring the counter signature of some person in authority, in control of the warehouse, or some other simple provision entirely safeguarding the interests of the public. Indeed such fraud is not possible in the State of Pennsylvania since the passage of the Act of May 16, 1901, P. L. 194.

The appellees further complain that the decision in this case would overthrow the title to large quantities of distilled spirits now in bond, and that the loss would be enormous. But this is far from correct, since such purchasers would be entitled to withdraw the spirits so purchased or to receive back the purchase money paid.

The Law of the State of Pennsylvania

In *Barlow vs. Fox*, 203 Pa. 114, the Court said:

> "Delivery must be actual and not merely symbolical where actual delivery is practicable, and if it is not practicable the party should leave nothing undone to secure the public from deception."

Three courses are open to the election of the pledgee, however:

(a) He may secure the payment of taxes and obtain physical possession of the whiskey, thus obviating the possibility of fraud.

(b) He may have the whiskey deposited in a general warehouse and obtain possession of the warehouse receipt issued by the proprietor therefor, thus avoiding the possibility of deception or fraud.

(c) Fossibly it would be sufficient for him to accept a warehouse receipt issued by the pledgor for whiskey in pledgor's possession and under his control with notice by posting on the premises, in the books of the company and to the Internal Revenue department.

It remains to inquire what the attitude of the Supreme Court of Pennsylvania is with reference to warehouse receipts for spirits stored in bonded warehouses. This question was first presented to that Court in the case of *Keil vs. Harris*, 4 Sadler's Pa. Supreme Ct. 201, where in a *per curiam* opinion the Court seems to have misconceived the nature of the transaction and to have regarded the delivery of the whiskey to the warehouse as a bailment to the United States Government, the Court saying:

> "It is a well settled fact where *personal property is in the hands of a bailee*, a transfer by *bill of sale* alone is good and valid as against the creditors of the vendor."

In *Miller vs. Browarsky*, 130 Pa. 372, the Court seems to have come to a different conclusion.

In that case a person purchased whiskey in a bonded warehouse from the distiller, but did not remove it or pay the tax thereon, although he paid the purchase money in full. The distiller subsequently sold the whiskey to a second party, who was without knowledge of the first sale, but who paid the tax and withdrew the whiskey. The Court held that the first purchaser was guilty of laches by suffering the dis-

tiller to exercise the power to re-sell the whiskey to an innocent purchaser for value. The Court there said:

> "It is clear that but for plaintiff's laches Jones would not have been able to sell the whiskey the second time; and the rule is well established that where one of two innocent parties must suffer a loss, such loss must be borne by the person whose neglect was the occasion of it. The plaintiff left the whiskey absolutely under the control of Jones, when, by reasonable caution, he could have placed it beyond his power to re-sell it. The defendant was a good faith purchaser, without any knowledge of the prior purchase and of the fraud of Jones. Having so purchased the whiskey, paid the tax, and taken it out of bond, we see no reason why he did not get a good title."

The logical conclusion derived from this case is that it required something more than the mere delivery of the warehouse receipt or bill of sale to convey title to the purchaser, which is in direct conflict with the case of *Keil vs. Harris (supra)*.

This question was next presented to the Supreme Court in the case of *Rosenbaum vs. Batjer*, 154 Pa. State 544. There a distiller issued to defendants certificates that he had on storage for their account fifteen barrels of whiskey which would be delivered on presentation of certificate and endorsed same to the order of the purchaser. The purchaser then sold the whiskey to plaintiff, endorsing the certificate with his name. The whiskey was never delivered, and remained in the warehouse where it had been stored by the distiller. After the last sale, defendants attached the whiskey as the property of their own vendee, and it was held that the defendants, by endorsing the certificates, estopped themselves from objecting to the title which the plaintiff had acquired from defendants' own endorsee.

The syllabus of that case as to the Act of 1886 is: "Query—Whether a distiller's certificate that he holds whiskey on storage for the account of another is within the Warehouseman's Act of September 24th, 1866 (P. L. 1867) 1363."

Pepper & Lewis, in the Digest of Decisions on this question, state that it is doubtful whether the title to whiskey is given by delivery of such receipts.

The only other case in the State of Pennsylvania in an appellate Court is *Sloan vs. Johnson*, 20 Pa. Superior Court Reports 643, but there the question of the title to whiskey in a bonded warehouse based upon warehouse receipts was not raised.

It follows, therefore, that in this State at least the question as to the validity of such warehouse receipts is open.

In the case of *White vs. Gunn*, 205 Pa. 229, the Supreme Court said:

> "It is as true now as it was when the rule was first announced in that case (*Clow vs. Woods*, 5 S. & R. Pa. 575), nearly a century ago, that if a purchaser pays the price for the goods purchased by him, without taking possession of them, he takes the risk of the integrity and solvency of his vendor when the rights of a subsequent *bona fide* purchaser or an execution creditor arises."

In *Barlow vs. Fox*, 203 Pa. 114, that Court said:

> "There has been no deviation from the general rule that delivery of possession is indispensable to transfer a title by the act of the owner, that shall be valid against creditors."

In *Conrad vs. Fisher*, 37 Mo. Appeal 352, this question was raised and ably discussed, and the Court finally concluded that a distiller could not pass title to whiskey in his

own warehouse by delivery of receipts merely. The same doctrine is laid down in *Union Trust Co. vs. Trumbull,* 137 Illinois 146.

The Law of the Federal Courts as to Warehouse Receipts

The second reason assigned by the dissenting opinion in the case at bar is that the opinion of the Court as recorded is not in harmony with the federal decisions in this circuit in bonded warehouse cases.

This question has not been before raised in this circuit, but it is respectfully submitted that with the exception of the case of Boarts, Trustee vs. Selden (now pending), neither this nor cognate questions have been in harmony with the dissenting opinion either in the conclusion reached or in the principles underlying it.

At the very threshold of this case the character of the Government supervision must be determined. Either the Government, on the one hand, takes possession of the product of the distillery, to the exclusion of all persons, and becomes a bailee, or, on the other, it exercises an oversight in the nature of police control, and cannot be deemed to be in any sense a warehouseman. This control is undeniably for the purpose of taxation merely, since the tax may be paid at any time after the spirits are distilled, and from that moment on, the spirits *cease to be contraband,* and become similar in all respects to any other commercial product.

It is urged that the gauger's certificate evidences ownership, since it accompanied the warehouse receipt. A moment's consideration, however, shows this to be error. The gauger's certificate only shows the proof of the whiskey and therefore the amount of tax due. Unless the whiskey is removed at once its quality changes, and a re-gauging is required. This is the full function of the certificate and the holder of such a certificate could not

complain if his failure to use it enabled a subsequent innocent purchaser for value to secure a later one, and pay the tax and remove the whiskey.

This introduces for consideration a further question. If it be held that a warehouse receipt is negotiable and title passes to the pledgee or vendee, it would seem that, by parity of reasoning, a subsequent, though innocent, pledgee or vendee would acquire no interest. In conflict with this, however, is the decision of *Miller vs. Browarsky (supra)*, where the Supreme Court of Pennsylvania has said that a subsequent innocent purchaser for value who exercises his right of purchase by payment of tax and removal of the whiskey, obtains a paramount title. It is respectfully urged that that decision is of binding effect upon this Court, and is the established law of Pennsylvania, which in effect is that a person who innocently purchases whiskey and takes possession of it, thereby acquires title to it, irrespective of prior existing pledges or sales, by delivery of warehouse receipts to others. This would seem to be decisive of the question at issue without further elaboration, since it follows that title cannot pass in Pennsylvania by delivery of the warehouse receipt unaccompanied by removal of the whiskey from the warehouse. This is consonant with the language of the U. S. Supreme Court in *United States vs. Witten*, 143 U. S. 76, in saying:

> "The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. *The Government assumed no responsibility to him for their safekeeping. If he was not satisfied with the security of the warehouse, he had only to take any measure consistent with the access and supervision of the Revenue officers, to make it more secure, or else to pay the tax and remove the spirits. The only duty which the Revenue officers owed in regard to the se-*

curity of the warehouse and the safekeeping of the spirits therein, was to the Government, and not to the defendants."

RIGHTS OF THE TRUSTEE IN BANKRUPTCY

It is urged that the rights of the trustee in bankruptcy under the facts in the case at bar, rise no higher than those of the bankrupt. Section 70 of the Bankruptcy Act, and the construction placed upon it, indicate the error of such a contention. It is by no means conceded that the title to the whiskey designated in the receipts should be deemed to pass even where the holder is the direct purchaser from the distiller, because such purchaser did not contemplate a removal of the whiskey, but, on the contrary, deliberately designed to suffer it to remain in the custody and under the control of the distiller for an indefinite period of years. As between the parties, where the goods are designated and are separable, the intention of the contracting parties prevails in vesting the title in the vendee if the parties contemplate an immediate delivery of the goods. Of course, the rule is otherwise where the intention to deliver is absent. Such a purchaser, however, would have the right to recover the value of the goods, but the title could not be deemed to pass.

A very different question arises where the rights of creditors attach through the Trustee in Bankruptcy under Section 70 of the Act.

It was said in *Bank vs. Staake*, 202 U. S. 149.

> "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it, is not applicable to liens, which, although valid as to the bankrupt, are invalid as to creditors."

It is to be borne in mind that by Section 70 *a* of the Bankruptcy Act, the Trustee in Bankruptcy is vested *by operation of law* with the title of the bankrupt to all property transferred by him in fraud of his creditors and to all prop-

erty which prior to the filing of the petition might have been levied upon and sold by judicial process against him, and by subdivision *e* of the same section the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. It was said in *Security Warehousing Co. vs. Hand*, 206 U. S. 415:

> "Here are special provisions placing the title to property transferred by fraud or otherwise, as mentioned, in the Trustee in Bankruptcy, and giving him the power to avoid the same."

In that case the Court held that holders of so-called warehouse receipts under a pledge which was invalid for want of a change of possession, had no equitable lien which took precedence to the title of the Trustee in Bankruptcy by virtue of the provisions of the Bankruptcy Act. That Court further said:

> "The method taken to store the property was as found by the District Court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts and thus raise money upon secret liens on property in the possession of the pledgor and under its control, and such scheme the Court said should not receive judicial sanction. Such a scheme under the facts and as carried out in the case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors."

Precisely this question was raised and determined in *Bank vs. Millbourne Mills Co.* (*supra*) where it was held that the Trustee in Bankruptcy could enforce the rights of the creditors whom he represented against a pledgee where the bankrupt itself was estopped to act. Can it be said that the position of a purchaser is distinguishable? The act says:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred unless he was a *bona fide* holder for value prior to the date of the adjudication."

The first clause of the sentence is most emphatic, that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided," and if this were all, there could be no question but that the rights of the trustee rise as high as those of a creditor. The act goes on, however, to say:

> "and may recover the property so transferred or its value from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication."

This certainly contemplates an additional power, and not a limitation. It enables the trustee to recover the physical possession of property or its value where it has been transferred "unless he (the purchaser) was a *bona fide* holder for value prior to the date of the adjudication." The purpose of the clause is manifest as enabling the trustee to deal with the property of the bankrupt so as to protect the rights of creditors by asserting them with power to set aside a sale and delivery of property if made after the date of the adjudication or if lacking in good faith.

In conclusion, it is submitted therefore, that the law of conscience, which happily is safeguarded by the law of the land, as technically enunciated, calls for the reversal of the Court below.

Respectfully submitted,

JOSEPH HILL BRINTON

Counsel for Appellant

APPENDIX

DOCKET ENTRIES

TANEY, TRUSTEE VS READING BANK C. C. Appls. E. Dist Pa.
No 1355 Mch Term 1910

Feb	12 1910	Petition to superintend and revise in matters of law filed.
"	14	Transcript of record filed.
Mch	14	Printed transcript of record filed.
"	15	Brief for Appellee filed.
"	17	Brief for appellant filed.
"	15	Argued Coram Buffington, Lanning & Archbald, *J.J.*
Apl	13	Certificate of filing of petition for review issued.
"	"	Appearance for appellant and receipt.
"	"	Transferred to printed calendar.
Nov	9	Opinion of Court by Archbald *J.*, filed.
"	"	Concurring opinion by Lanning *J.* filed.
"	"	Dissenting opinion by Buffington, *J.* filed.
Feb	20 1911	Order directing re-hearing and placing case on March 1911 argument list.
Mch	1	Petition of Gibson Distilling Co., et als, for leave to intervene filed.
Apl	25	Brief for intervenors filed.
May	2	Argument coram Gray, Buffington & Lanning, *J.J.*
Jun	19	Opinion of Court by Gray, *J.* filed.
"	29	Order confirming decree filed.
Jly	21	Petition for appeal to Supreme Court filed.
"	"	Order allowing appeal and staying proceedings filed.
"	24	Assignment of errors filed.
"	25	Affidavit as to amount in controversy filed.
Aug	9	Certified copy of record issued to counsel for appellant to Supreme Ct

APPEAL FROM DISTRICT COURT FOR EASTERN DISTRICT OF PENNSYLVANIA

(For opinion of the Court below see *In re Miller Pure Rye Distilling Company*, 176 Fed. 606.)

ARCHBALD, *District Judge:* The facts appear by the opinion of the Court below (176 Fed. 606), and need not be repeated here. The question involved is whether a pledge

of whiskey in store, under bond, in the warehouse of a distiller is effective, without actual delivery, by the issuing against it by the distiller, of so-called warehouse receipts. It was decided by this Court in the *Millbourne Mills Case*, 172 Fed. 177, that as to grain and flour in store, in the party's own warehouse, a valid pledge could not be made in this way, and that, having gone into bankruptcy, the invalidity of the transaction could be taken advantage of, in behalf of general creditors, by his trustee. And this was repeated in *First National Bank vs. Guaranty, Title and Trust Company*, 178 Fed. 187, as to machinery and book accounts, sought to be pledged by bill of sale and by assignment, the machinery being and remaining in the warehouse of the pledgor and the book accounts never having been reduced to possession by the pledgee. Unless these cases can be distinguished, they are decisive of the one in hand. It is sought to distinguish them, however, on the ground that, in the case of whiskey in a distillery warehouse, the goods are out of the possession and control of the owner being virtually bailed to the Government, and may therefore be pledged by a symbolical or constructive delivery, by any instrument by which they are identified, and the intent to pledge is shown. Delivery, actual or constructive, according to the character of the property, admittedly is imperative, and there being no actual delivery, the question is whether a substitute for it appears in the conditions here found.

It is enacted by Revised Statutes, Sec. 3271:

> "Every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window or other opening shall be made or permitted in the walls of such warehouse leading into the distillery

or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner."

And it is further provided by Revised Statutes, Sec. 3274:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse, except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

It was in a distillery warehouse of this description that the whiskey in controversy was stored.

A building erected by a distiller on the distillery premises pursuant to the statute, has none of the characteristics of a warehouse, where goods are received and stored for pay, as that term is understood and applied. *Bucher vs. Commonwealth*, 103 Pa. 523; *National Union Bank vs. Shearer*, 225 Pa. 470. And so denominating it only results in a confusion of terms. It is nothing more or less than a place where the products of the distillery may be securely stored, subject to the supervision of the officers of the Government under bond, until the taxes are paid. The arrangement is primarily for the convenience of the distiller, the spirits being allowed to age, and payment of the tax meantime being deferred, the Government being

protected by the bond given to the collector, and the assignment of a storekeeper to watch it, without whom nothing can go out or in. It may be that in accordance with the sections quoted, it is imperative on a distiller to erect on the distillery premises such a building as is there described. But it is provided by Act of August 27, 1894, Secs. 51, 52, 28 Stat. 564, that, in the discretion of the Internal Revenue Commissioner general bonded warehouses, not exceeding ten in number, may be established in each collection district, to which distilled spirits may be removed by a distiller from his distillery warehouse, under such regulations with regard to bonds, removal stamps, etc., as the commissioner may prescribe. And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place, entirely separate and distinct from his own establishment, where the product of his distillery can be removed and stored under bond, with the same advantage as if stored in a distillery warehouse of his own, and where they may be sold or pledged by means of warehouse receipts which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name. In his own warehouse, by contrast, except only as they are in ward to the Government for payment of the taxes, the goods are practically in the distiller's own hands. The storekeeper is a mere watchman to see that they do not get away, and all the checks imposed and supervision provided for, are directed solely to that end. At any time, and as to any goods, the distiller may pay the tax and remove them, and there is nothing to stand in the way. No one else but the distiller, whatever his *indicia* of title, is recognized, and no one but he can intervene. The statute expressly declares that the goods are in the joint custody of the Government, storekeeper and the distiller, and the Government's custody necessarily ends when the purpose of it has been subserved, leaving that of the distiller supreme. Not only is this the law, but it is the established practice as well. The goods in the distillery warehouse being thus on the premises and

in the possession of the distiller, and, once the tax is paid, subject to his entire control, there is no place for a delivery, actual or constructive, necessary to complete a pledge. In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. The authorities are clearly opposed to any such idea. As is said in *United States vs. Thirty-six Barrels*, 7 Blatch. 459:

> "The Act nowhere in terms provides that the Government Inspector shall have any possession custody or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is given to the inspector through his participation in the custody of the warehouse and by the discharge of his duty to keep the same locked, when not personally present, a means of guarding against illegal removal of spirits, but (it) invests him with no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition a custody of the spirits themselves. In point of law the owner of the spirits and the owner of the warehouse wherein they are stored is in possession of the spirits. All that the statute has done is to throw around his ownership, possession, custody and control, a surveillance and joint custody of the warehouse as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect."

So in *Witten vs. United States*, 143 U. S. 76, where the distiller was held liable for the tax, notwithstanding that the spirits had been stolen, it is said:

> "Under the requirements of the Internal Revenue laws, the warehouse, was provided by the owner of the distiller at his own expense, and on his own premises, and although declared to be a bonded warehouse

of the United States, and required to be under the direction and control of the collector of the district, and in charge of a Government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits instead of paying the tax at once. The Government assumed no responsibility to him for their safe-keeping."

The distillery warehouse, in the present instance, therefore, having none of the characteristics of a warehouse proper, and the supervision and control of the collector over the whiskey contained in it, in no sense constituting a bailment, the attempt to pledge it, by the issuing by the distiller of so-called warehouse receipts, was of no effect, no matter how specifically the property may have been described in them, nor how fully backed up by gaugers' certificates they may have been. It was held in *Union Trust Company vs. Trumbull*, 137 Ill. 146, that it is only as to goods in a public warehouse, that a symbolic delivery by means of warehouse receipts can be made; and that the warehouseman issuing the receipts must have the goods in his possession or control, to make the receipts amount to a delivery of the property for which they stand. And in *Conrad vs. Fisher*, 37 Mo. App. 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, that the receipts were not good. Nor does the case of *Miller vs. Browarsky*, 130 Pa. 372, in any respect sustain the contrary view. The distiller there sold whiskey in his warehouse to the plaintiff, Miller, who took as evidence a receipted bill, but let the whiskey remain in the warehouse undisturbed for three years. And in the meantime, the distiller executed certificates, in the form of warehouse receipts, against a part of the same to a third party, who

transferred them to the defendant, who, from time to time, furnished money to the distiller to pay the tax, and got withdrawal orders from the collector, on which the whiskey was removed. The death of the distiller brought the conflicting claims to light. The plaintiff sued the defendant in trover and conversion, but it was held that he had no case. The plaintiff, it was said, left the whiskey in the absolute control of the distiller, when, by reasonable precaution, by notifying the collector, and his storekeeper of his claim, he might have put it beyond the power of the distiller to resell. It is doubtful whether mere notice to the officers of the Government would have had that effect. But, however, that may be, the fact remains, that, notwithstanding the sale to the plaintiff, and the receipted bill given to him for the goods, which being prior in time would be superior in right, if the matter was to go by receipts, it was held, that as against the defendant, who advanced money to get the whiskey out of bond, and took the goods, they were of no account. Neither is *Keil vs. Harris*, 5 Cent. Rep. 865, necessarily the other way. It was assumed in that case, that, by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government, which as we have seen, is not so, and it is upon this mistake in assumption that the case proceeded, but, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured it to be delivered to him, against which the plaintiff had merely an attempted levy and sale. Neither is the case within that of *Exchange Bank vs. Uhlman, Goldsboro Co.*, 5 Dist. (Pa.) 480, decided by the learned District Judge, when Judge of the Dauphin Common Pleas. The warehouse where the whiskey there was stored, was that of a third party, and not of the distiller, and the receipts by which the [illegible] was claimed, emanated from the independent st[illegible]es. These certificates were, therefore, rightly held to possess the ordinary characteristics of warehouse receipts, such as

negotiability, and etc., which makes out a very different kind of case. The same is to be said of *Young vs. Lambert*, L. R. 3 Privy Council, 142, where it was held that goods in a Canadian warehouse on deposit until the freight and custom charges had been paid, could be the subject of a valid pledge. This was expressly put, however, on the ground that the pledge had been communicated to the Customs officer, accepted by him, the goods, according to the entry made by him in his books, being placed at the disposal of the pledgee. The goods, when they were pledged, were thus out of the hands of the owners, in the Customs warehouse, and by the act of the Customs officer, who had control of them, they were held by him subject to the order of the party to whom they had been transferred; which bears no comparison to the situation here. Nor, rightly considered, is there anything in *McCullough vs. Large*, 20 Fed. 309, which militates against the views herein expressed. The whiskey there was deposited in a distillery warehouse, and taxes were due to the Government upon it, and all that was decided was, that it could not, under the circumstances, be levied on and sold by the Sheriff on execution against the distiller. It is true, that it is given as a reason, that the whiskey so deposited was virtually in the possession of the Government of the United States, held for Internal Revenue taxes, and that this possession could not be disturbed. But this, as it is to be remembered, was said with reference to the interference by the sheriff, by execution, with the goods held under bond to the Government for the tax, which, as it is pointed out the Sheriff was in no position to pay, as neither was he to comply with the provisions upon which a live loan could thus be withdrawn. There is no attempt to consider or define the relation of the distiller to the goods, nor the relative position of the Government and the distiller thereto, which was not involved. Comparison in this connection is to be made with what is said on the subject in *United States vs. Thirty-six Barrels*, 7 Blatch. 459, and

United States vs. Witten, 143 U. S. 76, referred to above, where this is done.

It is said that there is a custom in the distillery business to issue certificates against spirits under bond in distillery warehouses, by means of which they are freely sold and pledged, and that serious consequences will follow if this is not upheld. When the spirits are in the warehouse proper, either such as is provided by Act of Congress, or recognized by the State law, so that it be not that of the distiller himself, such certificates no doubt are good. But where the goods are in the distiller's own hands, and the attempt is made to sell or pledge them by so-called warehouse certificates or receipts, issued by the distiller alone, the custom relied on flies in the face of the law, and cannot be observed. A possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom if there was nothing more. But, without resting on this, the goods against which said certificates are issued being in the distiller's own hands at the time, and (save only that the taxes must be paid) being under his complete control, there is no such delivery, either actual or constructive, by the mere putting out of receipts, as the law requires, to make an effective sale or pledge. The specification of the goods, in the same terms in which they are described in the storekeeper or gauger's books, does not help out the receipts. It is not a matter of description, but of control. And neither does the attaching of gauger's certificates, which are merely evidence that the goods are there. The gauger's certificates neither convey title, nor bind the goods, nor do they necessarily check the duplication of receipts. Neither gauger, storekeeper, or collector, when once the taxes have been paid, can restrain the distiller, no matter what receipts or certificates are known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose. And this is the whole case.

The Judgment is reversed, and the report of the Referee dismissing the petition of the Penn National Bank is confirmed.

LANNING, *Circuit Judge,* (concurring): I think the law distinguishes between the relation of a distiller to spirits manufactured by him, and stored by him in a distillery warehouse erected on his own distillery premises for his sole use, and his relation to spirits manufactured by him and stored by him in a general bonded warehouse erected by some other person on other premises for the use of distillers generally. The distiller can obtain from no other person warehouse receipts for his spirits stored in his own distillery warehouse, for there is no other person in possession of the spirits to give the receipts; but he may obtain such receipts from the proprietor or operator of a general bonded warehouse for the spirits he has stored therein, and by transferring the receipts he may make constructive delivery of the spirits therein described. While section 3271 of the Revised Statutes declares that a distillery warehouse "shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner," and section 3274 declares that "every such distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof," just as it declares of general bonded warehouses in section 51 of the Act of August 27, 1894, and while there are cases which speak of the possession of the Government when considering the attempt of a sheriff to levy on the spirits therein stored, the true relation of the Government to spirits stored either in a distillery warehouse or in a general bonded warehouse is, I think rather that of a policeman to prevent removal of the spirits before payment of the Government tax than that of a bailee. In the present case, the so-called warehouse receipts were issued by the distiller itself for spirits stored by it in its own distillery warehouse.

Each of the receipts had, at its head, the language "United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company," declared in the body of the receipt that the spirits therein described had been "received on storage from ourselves," and was signed "Miller Pure Rye Distilling Co., S. V. Nagle, President." These instruments therefore showed on their faces that the spirits therein described were in fact, as well as in law, in the possession of the distiller, and not the Government. Such instruments are not generally regarded as valid warehouse receipts by the commercial law, and they gave no lien to the Penn National Bank under the law of Pennsylvania, as I understand that law. I therefore concur in the opinion of Judge Archbald.

BUFFINGTON, *J.*, (dissenting.) The opinion of the Judge in the court below, reported at 176 Fed. Rep. 608, is so clear that it suffices me to rest on it as the substantial ground of my dissent. That opinion demonstrates, first, that the federal statutes give the exclusive physical possession of untaxed distilled spirits in a Government warehouse to the Government; that its storekeeper and lock exclude the distiller from entry to or possession of such spirits; and secondly, that under the law of Pennsylvania, an owner of personal property which is already in the exclusive possession of a third person can sell or pledge it without delivery of possession. The majority opinion avoids the application of this recognized Pennsylvania principle on the ground the distiller is in possession of the spirits. That opinion says:

> "The goods in the distillery warehouse being thus on the premises and *in the possession of the distiller*, and once the tax is paid, subject to his entire control, there is no place for a delivery actual or constructive, necessary to complete a pledge. In no sense are the goods bailed to the Government so as to permit a constructive delivery to be made."

The fact that the goods are "in the possession of the distiller" is the basis of the opinion and if that assumed basis does not exist, what is built thereon has no support. Now that in physical fact and Federal law the goods in the distillery are not "in the possession of the distiller," is to my mind demonstrated by the Judge of the court below who in his opinion, says:

> "It is true that the Government was not a formal and technical bailee of the whiskey, but its possession and control were of such a character as not to be distinguishable in effect from possession and control under a bailment. Whiskey in a bonded warehouse is in a peculiar situation. Usually, the title is in the distiller, and it is also true that for certain purposes he may be said to have some degree of possession, custody or control. At all events, he comes within the terms of a statute which subjects spirits to forfeiture if they be found in 'the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws or with design to avoid the payment of such taxes.' *United States vs. 36 Barrels of High Wines*, Fed. Cas. No. 16,468, 7 Blatchf. 459. But the subject must now be approached from a different point of view. How are the general creditors of a distiller affected by the situation and surroundings of spirits belonging to him and stored in his bonded warehouse? Does the distiller appear to be the owner? Has he such apparent possession as indicates the power to dispose of the property freely? Does he obtain a false credit by seeming to have the sole right to sell or pledge? As creditors are bound to take notice of the federal statutes governing a bonded warehouse, let us look at the provisions that are now relevant.
>
> "A distiller is required to provide at his own expense a warehouse in which nothing but spirits may be stored. The warehouse must have no doors or

windows leading into the distillery or into any other room or building and must be under the direction and control of the collector of the district and in immediate charge of a storekeeper who is assigned to this duty by the Commissioner of Internal Revenue. In this warehouse the spirits may remain for eight years, but they may be withdrawn at any time during that period. 2 U. S. Comp. St. 1901, p. 2122. If the Commissioner thinks the warehouse unsafe or unfit for use, he may require the distiller to provide another and to remove the spirits at his own expense. Id. 2123. The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the Government and the key is in the storekeeper's posession. The warehouse must not be unlocked or opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Id. 2124. Any revenue officer at any hour of the day or night may enter the building to examine gauge, measure, and take account of the spirits. Heavy penalties are denounced if his attempt to enter is obstructed by the distiller. Id. 2125. Immediately upon distillation the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used, and regulate their brands and stamps. Id. 2130, 2132. A formal entry that the spirits have been deposited in the warehouse must be made with the collector, the storekeeper and the commissioner, and a bond for the payment of the tax must accompany the entry. Id. 2133. Immediately after the tax has been paid, the spirits must be removed under penalty of forfeiture. Id. 2132. This removal is carefully guarded, and can only take place on the collector's order. Id. 2135, 2136. There are heavy penalties for removing spirits from the ware-

house except as provided by law, and these penalties may be inflicted although no intent to defraud may exist. Id. 2136."

To hold, in the face of the physical facts of a government storekeeper and government lock and keys provided by federal statutes that the whiskey is in the possession of the distiller because the distiller owns the bonded warehouse is equivalent to telling a man he is at liberty because the room in which he is locked is in a house he owns. Indeed, it seems to me the distiller cannot be said to be in possession of his property when he could be put in prison for attempting to take possession of it.

The law of Pennsylvania is fully referred to by the court below. The principle established by the decisions of that State, beginning with *Linton vs. Butz*, 7 Pa. St. 47, and running through *Morman vs. Kramer*, 73 Pa. St. 385; *Woods vs. Hull*, 81 Pa. St. (32 P. F. S.) 451; *Stephens vs. Gifford*, 137 Pa. St. 219, is thus summarized in the last case; "The retention of possession by the debtor of that which he has sold misleads his creditors and therefore is conclusively fraudulent as to his creditors. But where the chattel is in the actual physical possession of another than the debtor at the time of the transfer no creditor can be misled to his hurt." Accordingly it was held in Linton vs. Butz, *supra*, "Here, at the sale, the article sold was not in the possession of the vendor but in the hands of another as bailee; and the vendor did not take it again into his own possession. Hence the property being in the hands of the bailee the only possession was given of which it was susceptible. This is all that is required." It is of course true that in many Pennsylvania cases the prior possession was under a bailment, but the vital question before us in this case is not the particular character of holding, but the fact of exclusive holding. If the goods are not in the possession of vendor or pledgor. creditors are not misled, and because he has no possession

to mislead, the law permits a vendor or pledgor out of possession to sell or pledge without delivery of possession. Now so completely out of possession with relation to his creditors is the owner of goods in a bonded warehouse, and so absolutely is the United States in exclusive possession with relation to creditors that they cannot levy upon them even though they offer to pay the duties as in *Fischer vs. Dadistal*, 9 Fed. Rep. 145,—a case in this circuit decided by Judge McKennan and Judge Butler—or to pay the taxes as in *McCullough vs. Large*, 20 Fed. Rep. 310, also a case in this circuit decided by Mr. Justice Bradley and Judge Acheson. Now, what the nature of this possession was as between the Government and the distiller, whether it was a bailment or otherwise, is not the crucial question in the present inquiry for here the rights of creditors are involved, and cases like *United States vs.* 36 *Barrels*, No. 16,468, and *United States vs. Witten*, 143 U. S. 76, in which creditors were not involved but in which the relative rights of the Government and the distiller alone arose, must be read with that in view. In the former it was decided that a distiller was in possession of the goods so as to subject them to forfeiture under section 48 of the Act of June 30, 1864 (13 Stat. 240), and the opinion carefully confines itself to that precise question, saying: "the inquiry into the possession, or custody or control, *is not because possession, control or custody is material for any purpose, except as the means of identifying the person whose fraudulent intent or design is the cause of the forfeiture.*" In United States vs. Witten, *supra*, whiskey was stolen while in a government warehouse, and it was sought to defend against a bond given for the tax because the storekeeper was negligent and the warehouse insufficiently protected. But the Court refused to hold the government to such a measure of responsibility, holding, and this is significant as asserting the exclusive control of the government through its storekeeper, "the only duty which the revenue officer owed in regard to the security of the ware-

house and the safekeeping of the spirits therein, was to the Government and not to the defendants." But in our case the question is as to rival creditors and the owner being out of custody, control and possession, the law of Pennsylvania will not forbid him to validly pledge his whiskey because the federal law deprives him of the right of formally delivering a possession he does not have, cannot deliver or surrender and cannot use to mislead. If then this pledge was valid against creditors and subsequent purchasers, it was undoubtedly good as between pledgor and pledgee, and the assignee in bankruptcy simply succeeded to the rights of the bankrupt; *York vs. Cassell,* 201 U. S. 344. I am therefore constrained to record my dissent first because the majority opinion is at variance with the decisions of the Supreme Court of Pennsylvania; second, it is not in harmony with the federal decisions of this circuit in bonded warehouse cases; third, its practical effect is to cripple the distilling interest by preventing sale or pledge of product in bond, and to overturn a widespread and long recognized commercial practice.

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IN THE

Supreme Court of the United States

No. 115 OCTOBER TERM, 1913.

JOSEPH A. TANEY, Trustee of the Estate of the Miller Pure Rye Distilling Company, Bankrupt, Appellant,

vs.

PENN NATIONAL BANK OF READING, Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Argument for Appellee.

The facts are not in dispute. The question, as stated in the opinion of the Court of Appeals (R. 33), is "whether the transaction between The Miller Distilling Company and the Bank was a valid and binding pledge of the whiskey in bond as against the Trustee in Bankruptcy of the Miller Distilling Company." The District Court answered the question in the affirmative. The opinion of District Judge McPherson is printed, commencing at page 21 of the record, and is reported in 176 Fed., 606. His judgment was affirmed without dissent by Circuit Judges Gray, Buffington and Lanning

in the Court of Appeals. Their opinion is printed commencing at page 30 of the record and is reported in 187 Fed., 689.

Substantially the same question was later decided in the same way in *Pattison vs. Dale,* 196 Fed., 5, 115 C. C. A. 639, by Circuit Judges Warrington, Knappen and Denison in the Circuit Court of Appeals for the Sixth Circuit.

And substantially the same question was again decided by Morris, D. J., affirming the decision of John Hinkley, Special Master, who wrote an elaborate opinion discussing all the authorities. This case is reported as *Merchants Nat. Bank vs. Roxbury Distilling Company,* 196 Fed. R., 76.

Since the grounds of decision are succinctly stated in the head notes of these cases and the authorities upon which we rely are cited and commented upon in the opinions, we believe that we are saving the time of this Court by printing the head notes and referring the court to the opinions of the Circuit Court of Appeals. We print the opinion of the Court of Appeals for the Sixth Circuit as an appndix to this brief, p. 1.

The following is the syllabus of the decision of the Circuit Court of Appeals for the Third Circuit in *Taney, Trustee, vs. Penn National Bank of Reading,* 187 Fed., 689:

> 1. By the law of Pennsylvania, as established by the decisions of its Supreme Court, retention of possession by the vendor of personal property sold or otherwise transferred is fraudulent in law whenever the subject of transfer is capable of de-

livery, and no honest and fair reason beyond the convenience of the parties can be assigned for the vendor not giving up, and the purchaser, taking possession. But fraud is not imputed where the subject of the sale is not reasonably capable of actual delivery, or where delivery is made in accordance with the usages of the trade or business in which the sale was made.

2. A distilling company's warehouse receipts, calling for whiskey stored in its distillery warehouse, which is in practical effect, under the internal revenue laws, in the custody of the United States, and incapable of delivery by the distiller without payment of the tax, represent the property itself, and their transfer to a purchaser or a pledgee in good faith, together with the gauger's certificates in accordance with the usages of the business, under the law of Pennsylvania operate as a delivery of the whiskey, and, if made more than four months prior to the bankruptcy of the distiller, the sale or pledge is valid as against its trustees.

3. The relation between a distiller and the officers of the government in custody of the whiskey in his distillery warehouse is *sui generis*. It is prescribed by law, and is not contractual, and warehouse receipts issued by the distiller for whiskey so stored in bond are not within Act Pa. Sept. 24, 1866 (1 Purd. Dig. [13th Ed.], p. 393), providing for the negotiability of warehouse receipts, which receipts, under the decisions of the Supreme Court of the State, must have been issued by a third and independent person, in order that their transfer by the bailor to a purchaser or pledgee shall operate as a delivery of the property.

The following is the syllabus of the decision of the Circuit Court of Appeals for the Sixth Circuit in *Pattison vs. Dale,* 196 Fed., 5:

"1. Where distilled liquor is stored in a distillery warehouse under control of the collector of the district and in charge of the internal revenue storekeeper as provided by U. S. Comp. St., 1901, pp. 2122-2124, Secs. 3271-3274, *et seq.,* providing for a joint custody of the warehouse by the distiller and the storekeeper, the distiller's surrender of control does not divest his title nor prevent his dealing with the property subject to the paramount rights of the government."

"2. U. S. Comp. St., 1901, p. 2130, Sec. 3287, provides that, as spirits are received in a distillery warehouse, the gauger or storekeeper must place on the head of each barrel, an engraved stamp signed by the collector or storekeeper and gauger, showing number of proof gallons, name of distiller, date of receipt in the warehouse, and serial numbers of barrels in progressive order, and that no two or more casks or packages warehoused in the same distillery shall be marked with the same number. Held, that where, after spirits had been deposited in a distillery warehouse and properly marked as provided, the distiller pledged a certain number of barrels specifically designated by number, by issuing warehouse receipts, to the pledgee therefor, describing particular barrels by number, number of wine gallons, the date when made, and the number of warehouse stamp, etc., and thereafter became a bankrupt, he thereby effectively created an equitable lien in favor of the pledgee, the validity of which neither he nor his trustees could be heard to deny."

See also *Merchants Nat. Bank of Baltimore vs. Roxbury Distilling Co.*, 196 Fed., R., 76.

These opinions contain such a full discussion of the principles and authorities on which we rely that we refer to the same as our argument.

If this Court, however, desires to pursue this investigation further, we submit the following additional argument on the facts, the principles and the authorities affecting this controversy.

Distillers of whiskey for nearly fifty years have been accustomed to issue warehouse receipts in form similar to those here involved. For many years purchasers from distillers of whiskey stored in their bonded warehouses have treated these receipts, when delivered, as passing title to the goods in bond. Distillers, purchasers and bankers for a long time have used these receipts as collateral. Today in Pennsylvania millions of dollars are invested in whiskey so held; other millions are outstanding on loans, and hundreds of millions in the last fifty years have been exchanged on the faith and credit of such receipts. The importance of the decision of this Court, to those interested as distillers, purchasers and bankers, in these receipts or certificates, can hardly be overstated. If after so many years of use and fancied security, the transaction in this case is held to be ineffectual to pass title, the resulting financial disturbance to and necessary readjustment of the enormous distilling interests in Pennsylvania, Kentucky, Maryland, Illinois and Ohio, would be difficult of estimation.

In the case at bar the whiskey was pledged as collateral for a loan, and the warehouse receipts were delivered to the bank from which the money was borrowed.

Bonded distillery warehouse receipts were issued in the following form:

"No. 5456. 120 bbls.

First District of Pennsylvania,
United States Internal Revenue Distillery.
Bonded Warehouse
of
Miller Pure Rye Distilling Company.
Ryeland, Berks Co., Pa., August 26th, 1907.

Received on Storage from Ourselves
One hundred twenty (120) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, the Elements, Leakage, Evaporation or Accident. Deliverable only upon Surrender of this Certificate, Payment of Tax and Other Charges due thereon, and Storage at the Rate of Five Cents per Barrel per Month, from August 26th, 1907.

Inspection, Spring 1907.
Stored in Warehouse No. 2.
Serial Numbers of Packages 8159-8278.

MILLER PURE RYE DISTILLING CO.,
S. V. NAGLE,
President.

Address all communications to
Miller Pure Rye Distilling Company,
Philadelphia, Pa.

SPECIAL NOTICE—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender.

Endorsed:

Miller Pure Rye Distilling Company,
S. V. Nagle,
President.

Valid only when signed by the President or Vice President of the Company."

The gauger's certificates containing the marks, numbers and contents of the barrels accompanied the warehouse receipts and were the Record referred to in the receipts as "Marked and Numbered as per Record Attached." These receipts and certificates for an aggregate of 200 barrels were deposited with the Penn National Bank of Reading as collateral security for a note of the Distilling Company for $2,500. The note contained *inter alia* the provision: "having deposited with the said bank as collateral security for the payment of this and any other past or future indebtedness, liability or liabilities of the undersigned to said the Penn National Bank of Reading or the holders hereof, due or to become due, or that may hereafter be contracted, *the following property, to wit*: 200 *bbls. whiskey in bonded warehouse at Womelsdorf, Pa., as per warehouse rects., gauger's ctf. etc., accompanying, etc.*" The note was not paid at maturity and the Bank at a public sale bought the collateral and claims to be the owner of the whiskey, by its purchase of said warehouse receipts. The Distilling Company having been adjudged bankrupt, the Trustee in Bankruptcy took possession of all of its property, together with said 200 barrels of whiskey stored in the bonded warehouse of said distillery, for which said receipts had been issued.

By petition the Bank prayed for an order on the trustee to delivevr to it the 200 barrels of whiskey. On

reference to the Referee, he refused the prayer. The Court below, McPherson, J., reversed the decision of the Referee and an appeal was taken to the Circuit Court of Appeals, which affirmed the decision of the Court below.

A case involving the same question (*Boarts, Trustee, vs. Selden & Company,* October Term, 1910), had a short time previously been argued in the same Court, and an opinion had been handed down by Judge Archbald, (in which Judge Lanning concurred, and Judge Buffington dissented), deciding this same question the other way. This case was ordered for reargument and was heard at the same time as the case at bar, and the decision theretofore reached was reversed, Judge Gray writing the opinion, and Judges Lanning and Buffington concurring.

The question, therefore, to be decided, is: Was the delivery by the Distilling Company to the Bank of the warehouse receipts in controversy, together with the collateral note, under the laws of Pennsylvania, a valid transfer of the whiskey against the Trustee of the bankrupt Distilling Company?

Counsel respectfully submit the following propositions as determining the question at issue:

I. Under the law of Pennsylvania, considering the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of the trade or business, constructive delivery of the whiskey in controversy was sufficient, actual delivery was unnecessary, and the delivery of the warehouse receipts was a sufficient compliance with the law of Pennsylvania requiring delivery, actual or constructive.

II. The transaction was not fraudulent in fact, and there being no possibility of obtaining a false credit by reason of retained possession, the rule requiring a change of physical possession ceases, and the transaction cannot be held fraudulent in law.

III. Established trade customs, when long continued, and unbroken, bring with them strong presumptions of their legality and validity.

IV. The transaction was not fraudulent in fact, and the whiskey in question not being subject to execution on account of the custody and possession of the government, the trustee's rights are not superior to those of appellee as a *bona fide* holder for value prior to the date of the adjudication in bankruptcy.

V. The Supreme Court of Pennsylvania, the Superior Court, and the Courts of *Nisi Prius* of said state, have construed the Act of 1866 relating to warehouse receipts, and have, without exception, sustained the validity of these bonded distillery warehouse receipts, and have held that receipts of the character and form, and issued under the circumstances of those in controversy here, are warehouse receipts within the meaning of said Act, and pass title by delivery.

VI. The interpretations of a statute of the State of Pennsylvania by the highest courts of that state are binding upon this court, and are accepted by all federal courts as conclusive as to the meaning of the statute, even if, had it been a case of first impression, the federal court might have differently concluded.

Before proceeding with the discussion of the foregoing propositions, it may serve a useful purpose to point out to this Court, that the appellant's brief of argument is chiefly devoted to the consideration of the erroneous assumption that the decision in the Circuit Court of Appeals was founded upon the proposition that these warehouse receipts were technical warehouse receipts, or, stated in other words, receipts issued by a warehouseman or bailee, and appellant's brief accordingly argues that a person may not be his own warehouseman and issue warehouse receipts for his own goods stored in his own warehouse.

As stated, this is a misconception of the opinion of the Circuit Court of Appeals. What the Court decided was, that under the circumstances of this case the goods sold were not reasonably capable of an actual delivery, and that a constructive delivery, therefore, was sufficient; that the whiskey was in the custody of the government's officials; and that "the physical possession was not transferred because it was out of the power of the vendor to transfer the same," and that " a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well-settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property as against creditors to be made in the absence of the physical delivery of the property sold."

And again, said the Court:

"There are many other cases which it would be a work of supererogation to cite. It suffices to say that the law of Pennsylvania in respect of the question we are now considering is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the

circumvention of fraud and deceit in sales of personal property (which nowhere in terms refers to retention of possession by a vendor) it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the Courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made. These exceptions (as they are sometimes called) to the rule, of not divorcing possession from title to personal property, are generally recognized by the courts both in this country and in England; and in Pennsylvania, the line of demarcation between the cases which do or do not fall within the rule, has been laid down by the courts with singular clearness and precision."

And again:

"It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouses of the United States, as above described, at the time it was pledged or sold as hereinbefore stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out, and it seems little less

than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely upon the transfer of the so-called warehouse receipts, but attached to these receipts were the gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale or pledge was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania."

As a matter of fact, the Circuit Court of Appeals agreed with the contention of the appellant, that these whiskey warehouse receipts were not technical warehouse receipts, for the very reasons given in the brief of the appellant, namely, that a warehouseman cannot issue to himself warehouse receipts for his own goods, stored in his own warehouse, because such a transaction was not a bailment under the law of Pennsylvania.

I.

UNDER THE LAW OF PENNSYLVANIA, CONSIDERING THE CHARACTER OF THE PROPERTY, THE USE TO BE MADE OF IT, THE NATURE AND OBJECT OF THE TRANSACTION, THE POSITION OF THE PARTIES, AND THE USAGES OF THE TRADE OR BUSINESS, CONSTRUCTIVE DELIVERY OF THE WHISKEY IN CONTROVERSY WAS SUFFICIENT, ACTUAL DELIVERY WAS UNNECESSARY, AND THE DELIVERY OF THE WAREHOUSE RECEIPTS WAS A SUFFICIENT COMPLIANCE WITH THE LAW OF PENNSYLVANIA REQUIRING DELIVERY, ACTUAL OR CONSTRUCTIVE.

II.

THE TRANSACTION WAS NOT FRAUDULENT IN FACT, AND THERE BEING NO POSSIBILITY OF OBTAINING A FALSE CREDIT BY REASON OF RETAINED POSSESSION, THE RULE REQUIRING A CHANGE OF PHYSICAL POSSESSION CEASES, AND THE TRANSACTION CANNOT BE HELD FRAUDULENT IN LAW.

The principles bearing on the two propositions, just stated, are somewhat similar and at times so interwoven that it is deemed best to argue them together.

The contract in controversy here is a Pennsylvania contract. The transaction is solely between citizens of Pennsylvania.

The validity of a pledge or contract of sale, or what constitutes delivery under the laws of any state, must be determined by the local law of the state in which the transaction took place.

Lanning, C. J., in *Bank vs. Guarantee Title & Trust Co.*, 178 Fed. 189, (1910), thus states the rule:

> "Whether a conditional contract of sale, chattel mortgage or pledge of personal property is valid as against the general creditors of the vendor, mortgagor, or pledgor, or his trustee in bankruptcy, must be determined by the local laws of the state in which the transaction is had," citing authorities.

See also to the same effect:

Bryant vs. Swofford, 214 U. S., 279 (1908).
Thompson vs. Fairbanks, 196 U. S., 516 (1904).
Mfg. Co. vs. Vassell, 201 U. S., 344 (1905).
Dooly vs. Pease, 180 U. S., 126 (1900).
Warehousing Co. vs. Hand, 206 U. S., 415 (1906).

The Pennsylvania courts hold that where actual delivery is required, it is under the Statute of 13th Elizabeth, ch. 5, Sections 1, 2 and 6 ; Rob. Dig., 295.

Clow vs. Woods, 5 S. & R., 275 (1819)—opinion by Mr. Justice Gibson, is referred to by Judge Sharswood

in *McKibben vs. Martin*, 64 Pa., 352 (1870), in these words:

> "It is unnecessary to trace the decisions in England. *Clow vs. Woods*, 5 S. & R., 275, decided by this court in 1819, is the Magna Charta of our law upon this subject. The principles settled in that case have been recognized and affirmed by a bead-roll of subsequent decisions, which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession."

Note the exception, "and no honest and fair reason could be assigned for not giving up and taking possession."

The reason for the qualification of the rule requiring delivery and for the appearance of an honest and fair reason why the vendor or pledgor should not give up and the vendee or pledgee should not take possession, was given by Judge Gibson in the original case, in these words:

> "The inclination of my mind is, to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining its exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least without defeating fair and honest objects, intended to be effected by, and which constitute the motive for entering into the contract."

The first section of the Statute of 13th Elizabeth also clearly furnishes the reason for these exceptions as well as the reasons for the establishment of the rule.

> "SECTION 1. For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly practiced in these days than hath been seen or heard of heretofore, which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been, and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots,, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

It will be observed the purpose of the Statute was to avoid feigned, covinous, and fraudulent conveyances, which were becoming common, and which "have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors," etc., and "to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

With ratiocination, the Pennsylvania courts applied these principles, gradually getting away from the rigor of the rule, as the necessity of the rule became less and less pressing. This was absolutely necessary, if the rule was to be applied otherwise than blindly, and applied in such manner as to prevent fraud, rather than to further it. Let it be remembered that the Statute was by express terms passed to circumvent those who purposed or intended to delay, hinder or defraud creditors.

In this case, as in many others, the courts modified the rule to meet the modified conditions which the progress of civilization made necessary and to keep step with the industrial and commercial development of the times. As the reasons recited in the statute became less and less applicable the strictness of the rule was gradually relaxed as the decisions of the Courts of Pennsylvania both show and state.

Judge Archbald's opinion in this case is based upon a rigid construction of the Statute of Elizabeth, without regard to the real purpose and intent of said Statute, as declared in the decisions of this State, beginning with *Clow vs. Woods,* and extending down to date.

That opinion is a turning backward of the wheels of judicial construction, when the courts of Pennsylvania, and of practically every other State, are rolling those wheels the other way.

Upon the assumption that actual possession of personal property presupposed ownership, and thereby established credit, the rule was founded that upon a sale

of personal property, the retention of possession by the vendor was evidence of fraud. From the very first, however, there were exceptions to this rule thus founded upon such a presumption. In one of the first cases, and the leading case in Pennsylvania—*Clow vs. Woods*—("the Magna Charta of our law on the subject") these exceptions are referred to, and again and again are they found, in case after case, as will be presently shown.

It was said in the note of the *American Decisions to Twyne's* Case, 1 Smith Lead. Cas. 1, 31, 8th Ed.—"The subject of sales and mortgages of chattels without delivery of possession, has given rise in America to more protracted discussion than any other matter, probably, in the law." And again in the same note, page 32, it was said of the reason or want of reason for the rule under modern conditions of trade and commercial evolution:

> "The whole force of the rule is derived from the inducement of a false credit, by a sale entirely unevidenced to the world at large. It of course proceeds upon the two-fold theory, that possession of personalty is the indication of ownership, and that persons are credited upon the faith of such apparent ownership—at least so far as the rule applies to creditors. How far this can be said to be true now, if it ever was entirely true, would seem to be a question of great importance in regulating this rule of policy. Certainly, it cannot be maintained successfully, that in the enormously increased mercantile transactions it is usual or even frequent, for the creditor, before becoming such to take an inventory of the personal property of the would-be debtor. In nine cases out of ten, the credit is given upon the general reputation of the

debtor, and in entire ignorance of his ownership of this horse, or that carriage, or other articles. 'Dun' and 'Bradstreet' are the main dependence. It has also been admitted, from the very earliest cases, that when property is in the possession of a party as bailee, he cannot transfer to any purchaser, or creditor, a title good as against his bailor, although precisely the same deception is practiced in the one case as in the other—it has been said in recognition of this difficulty, that these contracts of bailment are in the usual course of everyday life, and the inconvenience resulting from subjecting goods bailed to the rule in *Twyne's* case would overbalance that caused by making them exceptions. Why, exactly, leaving intent out of the question, the parties should not consult their convenience by leaving the property with the vendor, either as bailee, or for his own convenience, it is difficult to say. The application of the rule is frequently almost robbery. Fair and full value has been paid, and can be reached by the creditor, and yet, although the creditor is in entire ignorance as to whether the article was once owned by or is bailed to the debtor who possesses it, the mere accident, one way or the other, will determine his rights. * * * A recognition of this fact, and of the inapplicability of the rule in its old strictness, has led to a very general relaxation of it, until it is in a fair way to almost entire abandonment in many jurisdictions, though a few still cling to it most tenaciously."

Justice Gibson said in *Clow vs. Woods,* 5 S. & R., 275 (1819):

"Statute 13 Elizabeth does not in words declare conveyance of goods fraudulent where the

vendor retains possession; but in general terms renders void all conveyances made to the end, purpose and intent of defrauding creditors. Hence it becomes incumbent on the courts to determine, from all the circumstances of the case, whether the conveyance be or be not made with a fraudulent intention and in judging of that it is held, that any neglect in leaving the vendor in possession, is fraudulent within the statute. The general rule, is that the possession must be transferred to the purchaser; and to this I propose to examine such exceptions as have been urged."

He then proceeds to examine numerous exceptions. Of the exception where, by the terms of the contract, it appears that possession was not intended to follow immediately, he says:

"I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract. It is necessary, not only that appearances should agree with the real state of things, but also, that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility to deception."

And again, in the same opinion:

"The inclination of my mind is, to give the statute a liberal, perhaps an enlarged construction, by putting the rule, requiring a change of possession, on grounds of public policy, and confining

its exceptions to those cases, where, from the very nature of the transaction, possession either could not be delivered at all, or, at least, without defeating fair and honest objects, intended to be effected by, and which constituted the motive for entering into the contract."

In the case of *Hughes vs. Robinson*, 24 Pa., 9, (1853), Mr. Justice Lowrie said:

"With very few exceptions, and notwithstanding some rather vigorous expressions in some of the decisions, the administration of justice, in relation to transfers of chattels, has moved steadily on, guided by a few well understood rules. A sale or assignment of chattels is voidable by creditors, unless it be accompanied by such corresponding change of possession as the thing is reasonably capable of; but a reasonable time after the sale is allowed for delivery. * * * If the circumstances of the sale and delivery be in accordance with those that usually and naturally accompany such a transaction, it cannot be declared a legal fraud."

In *Barr vs. Reitz*, 53 Pa., 256, (1866), Mr. Justice Agnew said:

"But in considering the question what is an actual delivery, the nature of the property and circumstances attending the sale must be taken into the account. We are not, in carrying out a mere rule of policy, to confound all distinctions between that which is capable of easy delivery and that which is not. * * * So there are many cases which allow the force of those circumstances which take away any false color or appearance of ownership remaining in the seller."

In the case of *McKibbin vs. Martin,* 64 Pa., 352, (1870), in which Mr. Justice Sharswood reaffirmed the case of *Clow vs. Woods,* and called it the *Magna Charta* of our law upon the subject, it was said:

"Without adverting to other points, it (*Clow vs Woods*) established that retention of possession was fraud in law whereever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. • • • But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer."

In *Crawford vs. Davis,* 99 Pa., 576 (1882), Mr. Justice Mercur said:

"The general rule, is that a sale of personal property is not good against the creditors of the vendor, unless possession be delivered by the vendor in accordance with the sale. In determining the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change of possession as will defeat the fair and honest object of the parties, is required."

In *Cessna vs. Nimick,* 113 Pa., 70 (1886), the Supreme Court of Pennsylvania said:

"It is now well settled that a change of the location of the property is not in all cases essentially necessary. Due regard must be had to the character of the property, the nature of the transaction, the position of the parties, and the intended use of the property."

In *Stephens vs. Gifford,* 137 Pa., 219 (1890), in an opinion by Mr. Justice Williams, it was said:

"* * * the duty of the purchaser was affected by the nature of the transaction, and that a delivery in accordance with the usages of the trade or business in which the sale was made was a sufficient delivery."

The Justice delivering the opinion thus concludes:

"All these cases recognize the rule, while they qualify it as the circumstances require in order to make its application just. The general rule undoubtedly is that the purchaser of goods must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of his purchase."

In the case of *Pressel vs. Bice,* 142 Pa., 263 (1891), the Supreme Court said:

"The modern doctrine upon this subject appears to be that, in determining the kind of possession necessary to be given, regard must be had, not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property.

> No such change of possession as will defeat the fair and honest object of the parties is required." (Citing cases).

Garretson vs. Hackenberg, 144 Pa., 107 (1891), clearly illustrates the foregoing cases. There the debtor transferred to his creditor all the appliances of a lumbering camp, teams, sleds, harness, tools, chains, etc., and also assigned to the creditor the contract for removing the lumber. The creditor purchaser did not remove the property, retained the debtor—the former owner—in charge as foreman, who continued operations, there being not the slightest evidence of any change of ownership, and the property was accordingly levied upon under a judgment obtained by another creditor. The Supreme Court held that a formal delivery could have been made of all the property purchased, but in view of the character and situation, the use that was to be made of it, etc., no delivery was necessary. Mr. Justice Sterrett, delivering the opinion, said:

> "It is well settled that a change in the location of the property is not always necessary, or even practicable. Due regard must be had to the character of the property, its intended use, the nature of the transaction, the position of the parties, etc."

In the case of *Bell vs. McCloskey,* 155 Pa., 319 (1893), involving the purchase of a lease of a dairy farm, with cattle and farming implements, the vendor being retained in possession and operating the same, there being no ostensible change of ownership, the court held under the circumstances that the purchaser had taken sufficient possession to entitle him to retain it as against the vendor's creditors.

In *Goddard vs. Weil,* 165 Pa., 419 (1894), the present Chief Justice of the Supreme Court said, of the sufficiency of delivery in that case:

> "This is to be determined in view of the relation of the parties, and the nature, use and situation of the property. This rule has been upheld in a long line of cases, among the later of which is *Renninger vs. Spatz,* 128 Pa., 524."

In *Keystone Watchcase Co. vs. Fourth St. Natl. Bank,* 194 Pa., 535 (1900), Mr. Justice Dean said:

> "In the eighty years that have elapsed since the decision of *Clow vs. Woods,* 5 S. & R., 275, the rigor of the rule laid down in that case, and it is the leading one in this state, has been greatly relaxed; nor, considering the progress in population and wealth, and the change in methods of conducting business, could it have been strictly adhered to, without great obstruction to business and hardship to individuals. Under that ruling, the cases were rare, where, as to creditors the ownership of chattels could be in one and the possession in another; in such circumstances, with few exceptions, the transaction was constructively fraudulent as to creditors. But, in the long line of cases following it, step by step, the rule has been so softened, that now, it may be said, with few exceptions, where the purpose of the contracting parties was, as between themselves, an honest one, and there was no concealment as to creditors of its true nature, the contract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps, constructively, if the contract, in view of its purpose, was actually an honest one."

This was followed by *Barlow vs. Fox*, 203 Pa., 114 (1902), the opinion being delivered by Mr. Justice Fell, who said:

> "When by the action of the parties there has been a separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties."

In a late case, that of *White vs. Gunn*, 205 Pa., 229 (1903), it was said by Mr. Justice Brown:

> "What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

Other cases upon the same subject, in which the same rules and principles have been discussed or ap-

plied, but without any distinguishing or additional features, are the following:

Babb vs. Clemson, 10 S. & R., 419 (1824).
Martin vs. Mathiot, 14 S. & R., 214 (1826).
Hower vs. Geesaman, 17 S. & R., 251 (1828).
Shaw vs. Levy, 17 S. & R., 99 (1827).
Wilbur vs. Strickland, 1 Rawle, 458 (1829).
Herron vs. Fry, 2 P. & W., 263 (1830).
Carpenter vs. Mayer, 5 W., 483 (1836).
Trovillo vs. Shingles, 10 W., 438 (1840).
Hoofsmith vs. Cope, 6 Whart., 53 (1841).
Young vs. McClure, 2 W. & S., 147 (1841).
Cadbury vs. Nolen, 5 Pa., 320 (1847).
Haynes vs. Hunsicker, 26 Pa., 58 (1856).
Born vs. Shaw, 29 Pa., 288 (1857).
Milne, Brown & Co. vs. Henry, 40 Pa., 352 (1861).
Graham & Mellor vs. McCreary, 40 Pa., 515 (1861).
Brawn vs. Kelly 43 Pa., 104 (1862).
Steelwagon vs. Jeffries, 44 Pa., 407 (1863).
Fry vs. Miller, 45 Pa., 441 (1863).
Dewart vs. Clement, 48 Pa., 413 (1864).
Long vs. Knapp, 54 Pa., 514 (1867).
Smith vs. Crisman, 91 Pa., 428 (1879).
Stadfeld vs. Huntsmann & Co., 92 Pa., 53 (1879).
Parks vs. Smith, 94 Pa., 46 (1880).
Pearson vs. Carter, 94 Pa., 156 (1880).
Brunswick & Balke Co. vs. Hoover, 95 Pa., 508 (1880).
Ziegler & Co. vs. Handrick, 106 Pa., 87 (1884).
Buckly vs. Duff, 114 Pa., 596 (1886).
Ditman vs. Raule, 124 Pa., 225 (1889).
Peek vs. Heim, 127 Pa., 500 (1889).

Renninger vs. Spatz, 128 Pa., 524 (1889).
Ayers vs. McCandless, 147 Pa., 49 (1892).
Caulfield vs. Van Brunt, 173 Pa., 428 (1896).
Lehr vs. Brodbeck, 192 Pa., 535 (1899).
Riggs vs. Bair, 213 Pa., 402 (1906).
Hill vs. Leibig Mfg. Co., 3 Pa. Super. 398 (1897).
Gattle Bros. vs. Kremp, 6 Pa. Super., 514 (1898).
Jones vs. Harvey, 9 Pa. Super., 326 (1899).
Kendig vs. Binkley, 10 Pa. Super. Ct., 463 (1899).

The common law prior to the Statute of Elizabeth, the Statute of Elizabeth, and the decisions in Pennsylvania construing both the common law and the statute, show:

That the requirement of the delivery of possession was to avoid fraud, because the retention of possession was, as a rule, inconsistent with the sale of the property. Such possession gave a false credit to the vendor, and therefore fraud was presumed, notwithstanding there was no dishonest intent, unless the retention of such possession was satisfactorily accounted for. In other words, where the property was susceptible of delivery, and there was no good reason why such delivery should not have been made, the failure to deliver amounted to a constructive fraud. But from the very beginning of the rule to the present date, there never was a time in the State of Pennsylvania, where the goods sold or pledged could not be retained by the vendor, or pledgor, if there was a satisfactory explanation to account for the non-delivery; as, for example, if there was a bailment, if the goods were in process of

manufacture, if the goods were so bulky that they were incapable of actual delivery, if the goods were in a warehouse, and many other exceptions that could be picked out of the cases. In fact, *Clow vs. Woods,* the Magna Charta of our law upon the subject, makes room for the exceptions in the broadest possible terms, when Mr. Justice Gibson says:

> "I take it to be necessary, not only that retention of possession be part of the contract, but that it also appear to be for a purpose fair, honest and absolutely necessary; or, at least, essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract."

Passing by all the intermediate cases and coming down to the last authoritive statement on the subject by the present Supreme Court, we have the same principle re-stated in the words of Mr. Justice Brown, in *White vs. Gunn, supra*:

> "In passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

Assuming, then, that the established law of Pennsylvania is the rule laid down by *White vs. Gunn, supra*: that no unbending test of the sufficiency of delivery and retention of possession can be applied to all cases; that in passing upon the sufficiency of possession taken by the purchaser in any particular case there must be taken into consideration: (a) the character of

the property; (b) the use to be made of it; (c) the nature and object of the transaction; (d) the position of the parties; and (e) the usages of trade or business: let us apply the rule to the facts.

(A) The character of the property, and (B) the use to be made of it.

Whiskey in a bonded warehouse, which is the subject of the controversy here, is really goods in process of manufacture. It still requires aging and treatment by the distiller under a uniform and special temperature, under the direction and care of the distiller. During this process, as well as that of manufacture in certain stages, the property is under the supervision and control of an officer of the United States government. New whiskey is unmarketable. It is unfit for use. Every distiller has his own processes for aging. It can not be aged under the direction of the distiller except in the bonded warehouse. It must be placed in such warehouse when drawn from the still under the U. S. government regulations. The whiskey, therefore, is in process of manufacture for the period during which it is stored in the bonded warehouse. The U. S. government regulations and the acts of Congress recognize the necessity for thus completing the whiskey by this aging process. Whiskey can not be bottled in bond until after it has been "aged" for at least four years (Sec. 2, Act March 3, 1897, 29 Statutes at Large, 627; Sec. 50, Act Aug. 27, 1894, 28 Stat. at Large, 564). There is thus a continuing process of manufacture during the storage of the whiskey in the bonded warehouse varying in point of time but extending over years.

The general rule of the common law, that a man cannot be his own warehouseman, storing goods with himself, issuing warehouse receipts to himself, and then utter such warehouse receipts and give them currency, is not applicable to the facts of the bonded warehouses of distilleries. While it is true that the distiller owns the building and the land of the warehouse, and that he has a certain joint custody with the revenue officers; nevertheless the fact remains that the actual power of physical control and custody of the goods stored in the warehouse, is in the United States Government. This custody is retained and the control is held by locks and keys, exclusively in the hands of the representatives of the Government; and the distiller can have no more access to the goods stored in such warehouse, can no more reach them or tamper with them, remove them, or in any manner interfere with them, than if such distillery warehouse was owned, controlled, and entirely in the possession of the Government.

The Internal Revenue Acts of the United States, (Sections, 3267 to 3276, 3287 to 3288, 3293, 3293a, 3301 to 3303 of the Revised Statutes) and the Internal Revenue Regulations, (pages 45 and 70), provide for the warehouse in controversy here and for the custody and control thereof by the government employes. The receiving cisterns and the room in which the same are placed, are in charge and under the lock and seal of the internal revenue gauger, designated for that duty. The locks and seals are provided by the government, and the key is in charge of the collector and such gauger as the collector may designate. When the spirits are drawn off into casks from the cistern, it must be under the supervision of the gauger and in the presence of the storekeeper, and they must be removed

directly to the distillery warehouse. Minute and detailed provisions are made with reference to the details of the still, the locks or seals, the going into the cistern room or building in the absence of the revenue officers, etc.

It will be observed that these provisions affect the whiskey prior to its reaching the distillery warehouse.

The Acts provide that every distiller shall provide at his own expense a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture, until the tax thereon shall have been paid, but no dwelling house shall be used for such purpose, and no door, window, or other opening, shall be made or permitted in the walls of such warehouse, leading into the distillery or into any other room or building, and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is declared to be "a bonded warehouse of the United States," to be known as "a distillery warehouse," and shall be under the direction and control of the Collector of the District and in charge of an internal revenue storekeeper assigned thereto by the Commissioner. The Commissioner, whenever in his opinion the warehouse is unsafe or unfit for use, or the merchandise therein is for any reason liable to loss or great wastage, may discontinue the warehouse and require the merchandise to be removed to some other warehouse; the transfer to be under the supervision of the Collector, or of such officer as he may designate, the expense, however, to be paid by the owner of the merchandise. If the removal is not made as ordered by the Commissioner, the merchandise may be seized and sold as goods are sold for taxes. The

storekeepers have charge, under the direction of a Collector, of the distillery warehouse. The distillery warehouse shall be in the joint custody of the storekeeper and the proprietor, but it shall be kept locked and shall at no time be unlocked or opened or remain open unless in the presence of the storekeeper, or other person who may be designated to act for him, and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the Collector having control of the warehouse. No fence or wall higher than five feet shall be maintained around the distillery so as to prevent easy access, and the distiller shall furnish to the Collector as many keys of the gates and doors as the Collector may require for any of his employes who may be authorized to make survey or inspection of the premises, or the contents, and the distillery shall be kept always accessible to such officers. The revenue officers at all times, as well by night as by day, shall have the right to enter any distillery building or place used for the business of distilling, or used in connection therewith for storage or other purposes, and to examine, gauge, measure, and take an account of everything therein.

Penalties are provided for the obstruction or molestation of the revenue officers in the performance of their duty, and the officers are given the right, by day or night, to break open by force any of the doors or windows, or break through any of the walls to enable them to enter the warehouse or distillery.

The Acts also provide that the distilled spirits shall be drawn from the receiving cisterns into casks or packages and shall thereupon be gauged, proved, and marked, by the internal revenue gauger, who shall cut on the

cask or package the quantity of the contents of such cask or package, and the name of the spirits, as known to the trade, and the spirits shall be immediately removed into the distillery warehouse when thus marked, and the gauger shall, in the presence of the storekeeper of the warehouse, place a stamp on the head of the package, which shall be signed by the Collector, by the storekeeper and by the gauger, and shall have written thereon the number of gallons, the name of the distillery, the date of receipt in the warehouse, and the serial number of each package, as the same are received from the distillery, and no two or more packages warehoused at the same distillery shall be marked with the same number. After the tax has been paid, no such spirits shall be stored or allowed to remain in the warehouse or on the premises. The gauger shall, under regulations of the Commissioner, make a daily return to the Collector, giving a true account in detail of all articles gauged or inspected and for whom, and the number and kinds of stamps used. The distiller shall on the first day of each month, or within five days thereafter, enter for deposit in such warehouse, under the regulations prescribed by the Commissioner of Internal Revenue, all spirits stored in such distillery warehouse, and the entries shall be in duplicate and contain the name of the person making the entry, the designation of the warehouse, the date, etc. It shall specify the kind of spirits, the number of packages, the marks and serial numbers, the number of gallons, the amount of tax on the spirits contained in the packages; all of which shall be verified by oath. And the distiller shall give bond in duplicate, with sureties, to pay the tax; the tax to be paid at the time when same are withdrawn from the warehouse and within eight years from the date of the entry.

Every storekeeper, (the employee of the government), must keep a warehouse book, containing a complete record, and also a book showing the materials brought into the distillery, and such storekeeper must deliver a report to the Collector having control of the warehouse, to be recorded and filed in the office of the Collector, and transmit a copy thereof to the Commissioner of Internal Revenue.

The Internal Revenue Regulations provide that storekeepers are required to be on duty and in daily attendance at the warehouse at which they are respectively assigned, until relieved, whether by day or night, and the storekeeper assigned to any distillery warehouse, has charge, by the express provisions of the law, both of the warehouse and the distillery, under the direction of the Collector, and gaugers, storekeepers, and storekeeper gaugers, are strictly prohibited from entrusting locks, keys or seals in their charge to any person other than an internal revenue officer entitled to receive the same.

The Revised Statutes in all of these provisions, and everywhere, in discussing these distilleries and warehouses, refer to the warehouse as "distillery warehouse," "special bonded warehouse," and "bonded warehouse."

Penalties by fine and imprisonment are enacted for the violation of these acts, rules and regulations.

It will be observed that by section 3271 of the Revised Statutes, it is provided that such a warehouse,

> "Is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and

control of the Collector of the district ,and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner."

And under section 3274 it is provided:

"Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse, except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

The statutes, therefore, clearly draw the distinction between the *joint custody* of the storekeeper and the proprietor, and the *exclusive control* of the collector of the district through the internal revenue storekeeper. The joint custody of the proprietor or distiller, gives him no control whatever over the goods stored, and he can neither place any goods in the warehouse nor take any goods out of the warehouse.

It would tax the ingenuity of any man to devise a system whereby goods thus stored in the distillery warehouse could be more completely removed from any power or disposition or control by the distiller, than are provided by these enactments and regulations.

Now, what was the purpose of it all? Why this provision for distillery warehouses? Why these minute regulations thereof? Why this permission, without pay-

ment of tax, to retain whiskey on storage for a period of eight years? The whiskey is measured, gauged, put into packages, marked and stamped when drawn from the cistern, before it is placed in the warehouse, or rather at the time when it is so placed. This elaborate system was adopted and approved by the government, because of the nature of the business as developed by the custom and usage of the trade. Whiskey when first distilled is not ready to go into consumption. It requires aging. The older it gets the more valuable it becomes. To be aged properly, certain requirements of temperature, etc., are necessary. To provide for the guarantee of genuineness and to avoid adulteration, it was found desirable to have the whiskey retained in the distillery under the control and custody of the government officers. The government practically guarantees, by its marks, gauges, etc., the genuineness of the goods, their age, and their freedom from adulteration. The government tax, as a rule, is several times the value of the whiskey. To have compelled the payment of this tax immediately upon the manufacture of the spirits, and to have compelled the distiller thus not only to advance this money, but also the cost of production, and to wait for repayment for years, pending the period when the goods would be marketable, was found to be undesirable, unfair, and to accomplish no good or useful purpose. Besides this, by paying the tax and removing the goods the distiller, purchaser or pledgee would lose the outage both on the price of the whiskey and the tax of $1.10 per gallon paid on it, which amounts, as will be hereinafter shown, to from 25% to 40% of the price of the whiskey.

So, too, it was found impracticable, as a business proposition, for the distiller to manufacture the whiskey, store it in the distillery warehouse, and carry it at

his own cost and expense, until the same should become marketable. This would involve enormous outlays of capital. Accordingly the custom grew up of issuing warehouse receipts, having attached thereto the certificate of the revenue officers showing the serial numbers of the packages, the number of gallons, the date of inspection, etc. The warehouse receipt certified that the number of barrels specified were to be delivered to the order of the purchaser, upon return of the warehouse receipt, and the payment of the tax and charges due; they also provided for the payment of storage, at so much per barrel per month, with provision that loss, by fire, the elements, leakage, evaporation, or unavoidable accident, was at the purchaser's risk. The whiskey could not be withdrawn without the consent of the revenue officers, and by their direction, until the payment of the government tax, and under the terms of the receipt could not be withdrawn without the payment of the storage charges, and return of the reecipt.

These were the purposes of the creation of these United States bonded distillery warehouses, and the reasons for their creation, and the reason and purpose for issuing the warehouse reecipts.

It is not necessary to assume, as was required in the opinion of Judge Archbald, that the revenue regulations constituted the government a bailee of the whiskey stored in such warehouse. A bailment is not the only condition in Pennsylvania which will excuse actual delivery and permit of constructive delivery. Much less will suffice to mitigate the rigor of the rule requiring actual delivery. *United States vs. 36 Barrels,* 7 Blatch., 459, (1870) holds:

> "All that the statute has done is, to throw around his ownership, possession, custody and con-

trol (the distiller's), a surveillance, and a joint custody of the warehouse, as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect."

This is amply sufficient for our contention.

So, too, in *Witten vs. United States*, 143 U. S., 76, (1891) where the distiller had been held liable for the tax, notwithstanding the spirits had been stolen, it was held:

> "The warehouse was provided by the owner of the distillery, at his own expense and on his own premises, and, although declared to be a bonded warehouse of the United States, and required to be under the direction and control of the collector of the district and in charge of the government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. The government assumed no responsibility to him for their safekeeping."

This in no manner militates against our position. It recognizes a joint custody.

The decision of Judge Bradley and Judge Acheson in *McCullough vs. Large*, 20 Fed. Rep., 309, (1884) emphasizes our contention; namely, that for some purpose, the government had the control and a joint possession of the whiskey stored in the warehouse. The Court said:

> "The whiskey in question was virtually in the possession of the United States, held for internal revenue taxes—and the sheriff could not rightfully disturb that possession."

An examination of the opinion in both *United States vs. Witten* and *United States vs. 36 Barrels*, shows that the inquiry was limited to the relation of the distiller to the government, and not to the relation of the government, by reason of its joint custody and its control, to third parties. Thus, in the former case the court held that: "the only duty which the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein, was to the government, and not to the defendants." And in the latter case the court says:

> "The inquiry into the possession or custody or control is in any case immaterial for any purpose, except as the means of identifying the person whose fraudulent intent or design is the cause of forfeiture."

In the first opinion of Judge Lanning, concurring with Judge Archibald, he says:

> "While section 3271 of the Revised Statutes declares that 'a distillery warehouse shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the commissioner,' and section 3274 declares that 'every such distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof,' just as it declares of general bonded warehouses in section 51 of the Act of August 27, 1894, and while there are cases which speak of the possession of the government when considering the attempt of a sheriff to levy on the spirits therein stored, the true relation of the government to spirits stored either in a distillery warehouse or in a general bonded warehouse is, I

think, rather that of a policeman to prevent removal of the spirits before payment of the government tax than that of a bailee."

This was before the reargument and reversal. But to this holding counsel make no objection. As previously stated, a technical bailment is not necessary. So long as there was a policeman on guard, acting for the government, and not for the distiller, holding his mace aloft to prevent any interference by the distiller or anyone else, with the control of the government until the tax should be paid, that would excuse actual delivery by the distiller.

Under the express terms of the statute, and under all the decisions, and every one of them, there can be no question of the fact that the revenue officers of the government in a distillery warehouse have a joint custody with the proprietor, and so long as the tax is unpaid, the exclusive control and physical possession of the goods stored therein; and this, whether you consider such officers as storekeepers, policemen, or by any other name as sweet, and whether they are bailees or not. The physical possession by the government retained for a lawful purpose excuses the delivery in specie of the goods, there being a reasonable, fair and honest explanation of the whole transaction.

As a matter of fact, the joint custody of the distiller with the government, of which some of the cases speak. arises from the provisions of the Revivsed Statutes which permits the distiller, in the presence of and with the representatives of the Government—the revenue officers—to have access to the whiskey for certain purposes, that is, to care for and look after the same; the

distiller having no right whatever to remove the goods, under the severest fines and penalties; nor to obtain access thereto, except with the consent and in the presence of the officers of the Governmnt.

These minutes rules, regulations and provisions of the statute to all intents and purposes make a bonded distillery warehouse as much a place beyond the actual power of control of the distiller, as to taking possession of the goods, disposing of the same, transferring physical possession, or any other exercise of physical manipulation, as if such warehouse were owned wholly and solely by the United States Government.

Judge Archbald's conclusion that the storekeeper is not in possession of the barrels of whiskey in a bonded warehouse was reached after a consideration of the Revised Statutes. We think that the opposite conclusion is required. Possession is not a theory but a fact involving two elements, one physical and the other mental. The Romans described them by the terms *corpus* and *animus*. In *Union Trust Company vs. Wilson*, 198 U. S., 530, 537, (1904), Mr. Justice Holmes said:

> "When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense. *Gough vs. Everard*, 2 H. & C., 1, 8; *Ancona vs. Rogers*, 1 Ex. Div., 285."

Judge Buffington quotes from Judge McPherson's opinion in the Miller case as follows:

> "The warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete

and practically exclusive. A lock is put on by the government, and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened or remain open except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out except by the collector's order addressed to the storekeeper. Id. 21, 24. Any revenue officer at any time of the day or night may enter the building to examine, gauge, measure and take account of the spirits. Heavy penalties are denounced if his attempt to enter is obstructed by the distiller. Immediately upon distillation, the spirits must be placed in the warehouse. Careful regulations provide what kind of packages may be used and regulate their brands and stamps."

Judge Buffington adds:

"To hold, in the face of the physical facts of a government storekeeper, and government lock and keys provided by federal statutes, that the whiskey is in possession of the distiller because the distiller owns the bonded warehouse is equivalent to telling a man he is at liberty because the room in which he is locked is in a house he owns. Indeed, it seems to me the distiller can not be said to be in possession of his property when he could be put in prison for attempting to take possession of it."

Judge Archbald reached the conclusion that the distiller and not the storekeeper was in possession of the whiskey at the time of sale, principally because the custody of the government was assumed for the special purpose of ensuring the collection of the taxes, and would terminate when that purpose was accomplished. But

the fact that the government storekeeper is put into the relation which he occupies to the whiskey (whatever that relation may be), for the special purpose of protecting the revenue, and the fact that the distiller may terminate that relationship at any time by payment of the taxes does not assist in determining what that relationship is while it exists. The storekeeper occupied a certain relationship to the barrels of whiskey when the sales were made. Was it possession at that time, or was it not? It is immaterial that the relation might at some time thereafter be terminated. A learned writer in defining the elements of actual possession says:

> "The will and power required are only such as are sufficient for the present. * * * So the possessor may have a mind to surrender his possession very soon, as in the case of the finder who knows the owner of the article and is actually on his way to restore it to him, and yet have complete present possession." *Terry, Principles of Anglo-American Law,* Sec. 280.

Judge Lanning, in his first opinion, held that the storekeeper was not in possession, but that the "true relation is, I think, rather that of a policeman to prevent removal of the spirits before payment of the government taxes." But such "a policeman" may certainly be in possession of the goods, the removal of which he is appointed to prevent. The purpose of his appointment does not necessarily determine the fact whether he is in possession or not. The provision of Sec. 3274 that "every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof" furnishes no *indicia* of the relation of either party to the barrels of whiskey. That must be determined by other provisions of the statutes. A person may have joint or

sole custody of a house and yet be excluded in fact or by a rule of law from the possession of chattels in the house. Nor is the fact, also relied on by Judge Archbald, that "the arrangement is primarily for the convenience of the distiller" material. The question is not, when or why the government takes charge of the goods, or how the relationship can be terminated, but what the relationship was while it existed, and at the time when the sales in this case were made.

This discussion is well summed up in this case by Judge Gray, delivering the opinion of the court (Record, pp. 37-41), as follows:

> "The following facts seem to be clearly established by the records before us:
>
> The whiskey was not so in the physical possession of the Distilling Company, as to render possible a delivery at the time that the pledge was made in the one case and the sale in the other, consistent with the avowed and fair purpose of the transaction. The facts in support of this proposition must be examined with some care, as the contrary has been contended with much force and ability.
>
> The excise tax on whiskey is one of the most fruitful sources of revenue possessed by the Federal Government, and the Internal Revenue laws and the Treasury regulations made in pursuance therefor, provide for and safeguard its collection with the most scrutinizing care and particularity. It is well known that a marketable product is not the result of mere distillation of the liquor from grain or fruit. In fact, its change into such a product may be said to be hardly begun when it makes its appearance in the tank or cooling vats. It requires

to be skillfully cared for and ripened, and for the ripening process it is necessary that the whiskey should be stored in wood for several years. The tax on whiskey is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whiskey itself, the tax of $1.25 a gallon being about five times the ordinary value of the whiskey at the still. It is manifest that this extraordinary tax could not be collected on the whiskey as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax. As this involved quite a number of years, the government, for the convenience of the distiller, as well as for the protection of its own revenue, has provided by law for the custody and control of the whiskey from the time it leaves the still until, being properly aged, it has become marketable, or until it is convenient for the distiller or owner to pay the tax thereon and withdraw the same from such custody. Where the amount of the tax is so much out of proportion to the value of the whiskey, a great temptation is presented to evade the payment of the same. To guard against this, the government, by most carefully framed provisions of law and regulation, takes charge of the liquor from the time it issues from the still until it is withdrawn from its custody by the distiller or owner, upon payment of

the tax. These provisions of law are most minute and occupy many sections of the Revised Statutes.

Of these it may be well to recite in full the following:

> 'Sec. 3271. Every distiller shall provide, at his own expense, a warehouse, to be situated on, and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the Collector, is hereby declared to be a bonded warehouse of the United States to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner.
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> * * * * * * *
>
> 'Sec. 3273. The storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith; and every storekeeper shall have charge of the warehouse to which he is assigned, and of such distillery, under the direction of the collector controlling the same.
>
> 'Sec. 3274. Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. It shall be kept

> securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper, or other person who may be designaed to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse.'

Whenever in the opinion of the Commissioner of Internal Revenue, such distillery warehouse is unsafe or unfit for use, he may discontinue such warehouse and require the merchandise therein to be transferred to such other warehouse as he may designate. Such transfer shall be made under the supervision of the Collector, or such officer as may be designated by the Commissioner, and the expense thereof shall be paid by the owner of the merchandise. (Sec. 3272). In this warehouse, spirits may remain for eight years, and they may be bottled after four years, but not before, and may be withdrawn at any time, upon the payment of the tax and charges. (Act of August 27th, 1894). As said by the learned judge (McPherson) of the court below, the warehouse is theoretically in the joint custody of the storekeeper and the proprietor, but in fact the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the storekeeper's possession. The warehouse must not be unlocked or opened, or remain open, except in the presence of the storekeeper or his lawfully designated representative, and no articles may be received or taken out, except by the Collector's order, addressed to the storekeeper. (Sec. 3274). Revenue officers may, at

any hour of the day or night, enter the building to examine, gauge, measure and take account of the spirits. (Sec. 3276). Immediately upon distillation, the spirits must be placed in a warehouse in casks or packages, as provided by law, and shall thereupon be gauged, proved and marked by an Internal Revenue Gauger, who shall cut on the cask or package containing such spirits, in a manner prescribed by the Commissioner, the quantity in wine gallons and in proof gallons of the contents of such casks or packages. The same shall be cut on the head of such cask, 'and the Gauger shall, in the presence of the storekeeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the Collector of the District and the storekeeper and gauger.' Written upon the stamp must be the number of proof gallons, the name of the distiller, date of receipt in the warehouse and the serial number of each cask or package. This stamp must be signed by the United States Storekeeper and by the United States Gauger. (Sec. 3287). As a matter either of regulation or of practice, a gauger's voucher or certificate containing these particulars is delivered to the distiller. In the last of the cases at bar, the Master finds that the United States Gauger gave the paper certifying to the receipt, inspection, gauging and marking of the barrels of whiskey in question, and he finds in addition that there is a blank space left in this document in which may be noted withdrawals of the whiskey. The same is true also as to the certificates in the first case. It was stated without contradiction in the course of the testimony, at the trial in the latter case, that without conspiracy with the gauger, these receipts could not be duplicated.

There are heavy penalties for removing spirits from the warehouse, except as provided by law, and these penalties may be inflicted, although no intent to defraud may exist.

It is found as a fact in both cases, that the whiskey in question was in such bonded distillery warehouse of the United States, as above described, at the time it was pledged or sold as hereinbefore stated, and under the control and custody of the officers designated by law. That such control was exclusive, is apparent from the provisions of the law as above pointed out,—and it seems little less than absurd to say that the distiller was in possession of this property, when he could have been put in prison if he had attempted to take possession of it. It was property thus situated and circumstanced that the pledgor in the one case intended to pledge and believed that he was pledging, and the vendor in the other intended to sell and believed he was selling, and the legal title to which the pledgee and vendee, respectively, had good reason to believe they had received. It is true, they relied largely on the transfer of the so-called warehouse receipts, but attached to these receipts were the Gauger's certificates, specifying by serial number and brand the particular barrels of whiskey that were the subject of the sale, and nothing required by such a sale or pledge, was left undone by vendee or pledgee. At common law, sales of personal property do not require to be documented, though documents, such as bills of sales and warehouse receipts, may be convenient evidence of such a sale.

We think the transactions here under consideration, between the pledgor and pledgee and the vendor and vendee are quite within the spirit and

meaning of the rule as to sales of personal property, established by the decisions of the Supreme Court of Pennsylvania. No aspersion is attempted to be made of the perfect good faith obtaining in each case. To all the world, but especially to those engaged in the business of distilling and buying and selling whiskey, it was apparent that the physical custody and control of the whiskey here in question was not in the distiller and vendor, but in the Revenue Officers of the United States, and in neither case was the distiller capable of making physical delivery to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated. It was a situation created and established by a law of the United States, of which all persons, creditors as well as others, were presumed to have had knowledge."

As to the absence of any fraudulent intent, or any fraud in fact, or want of good faith, the Court found (Record, page 33):

"It should be premised that the records disclose that the pledge in the one case and the sale in the other were for value, and without fraud in fact, and were both made more than four months before the petition in bankruptcy was filed."

(C) The nature and object of the transaction, and

(D) The position of the parties.

There is no reason whatever for taking the whiskey away; there is every reason for letting it stay.

The practical reasons which influenced the trade to adopt the method of doing business which prevails and led to the issuing of those warehouse receipts have been discussed to some extent in showing why these warehouses were established by the governmental regulations, and the policy of justice and fairness which influenced the government in deferring the payment of taxes.

It is no doubt true that whiskey withdrawn from the distillery warehouse, in the hands of a third party, at once depreciates in value, because of the fear of adulteration and the lack of the guarantees afforded by the gaugers' certificates and the control of the government.

Likewise, the right of the distiller or owner to bottle the whiskey in bond under the provisions of the revenue laws is lost in case the whiskey is removed from the warehouse. This right is an extremely valuable one, and has come to be regarded in the trade as a guaranty on each bottle of the standard of purity, quantity and quantity.

The Act of Congress of March 3, 1897, ch. 379, 29 Stat. L., 626, provides:

> "Whenever any distilled spirits deposited in the warehouse of a distillery having a surveyed

daily capacity of not less than twenty bushels of grain, which capacity of not less than twenty bushels thereof is commonly used by the distiller, have been duly entered for withdrawal upon payment of tax ,or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger, in charge of such warehouse, may immediately draw off such spirits, bottle, pack, and case the same."

It will be observed that this statute recognizes the owner of the whiskey as well as the distiller, and gives to either the right to bottle the whiskey in bond under its provisions. The provisions of this statute relating to "owner" can not be carried out without a change of ownership of the whiskey in the warehouse prior to actual delivery, or removal. Clearly the direct wording and meaning of this statute require that a transfer of title and possession by means of warehouse receipts or other constructive delivery be recognized as sufficient.

Likewise, the United States government regulations do not allow whiskey to be bottled in bond until it has aged for at least four years. Section 2, Act March 3, 1897, ch. 379 (29 Statutes at Large, 627). Section 50 of Act of August 27, 1894 (28 Statutes at Large, 564).

It is, therefore, a well-established custom among distillers to sell their bonded whiskey long before the four years' period of ageing has elapsed, and to store the whiskey so sold for the purchaser until it is ready for bottling. Were this custom overthrown, it would require each distiller to have almost unlimited capital of his own tied up continuously in the great quantities of whiskey held under bond for the necessary ageing in his warehouse. He could neither sell it nor borrow money upon it as security.

Moreover under Revenue Act August 28th, 1894, Ch. 349, Sec. 50, 28 Stat. at Large, 564, an allowance is made by the government for shrinkage by leakage, evaporation, etc., commonly known in the trade as "outage." If, therefore, the whiskey is removed before the ageing process is completed and delivered to the purchaser or pledgee or stored elsewhere, these outage allowances would be lost and the distiller, purchaser or pledgee would not only have to pay the government tax in advance, and lose the interest, but would also have to pay such tax on whiskey he would not obtain. The allowance runs as high as nine gallons for whiskey stored between 45 and 48 months. The tax on this would amount to $9.90 per barrel, or from 25% to 50% of the selling price of the whiskey, depending upon its age at removal. There would also be a loss in shrinkage from transportation and the privilege of bottling in bond would be gone.

The case now before the court for consideration is a striking illustration of the benefits of this custom. "The nature and object of the transaction" was that the Distilling Company desired to borrow money from the bank for use in its business. It borrowed $2,500 and gave as collateral security therefor 200 barrels of whiskey. This whiskey was in its bonded warehouse and delivery

thereof was by warehouse receipts. The whiskey, being in bond, could not be actually delivered to the bank without payment of the government tax. To pay this tax the Distilling Company would have been compelled to pay to the government more than $10,000—almost four times the amount of its loan—and the whiskey was not yet fit for consumption because not properly aged.

It needs no argument to show that such a proceeding would entirely defeat "the nature and object of the transaction" as contemplated by the parties. Such being the case, the constructive delivery by means of the warehouse receipts was sufficient under the circumstances and should be sustained.

It is said by Judge Archbald in his opinion filed in this case, that:

> "It is provided by Act August 28th, 1894, Secs. 51, 52*, 28 Stat., 564, that, in the discretion of the Internal Revenue Commissioner, general bonded warehouses, not exceeding ten in number, may be established in each collection district, to which distilled spirits may be removed by a distiller from his distillery warehouse, under such regulations with regard to bonds, removal stamps, etc., as the Commissioner may prescribe. And wherever bonded warehouses of this character exist, as was the case here, every distiller of the district has a place, entirely separate and distinct from his own establishment, where the product of his distillery can be removed and stored under bond, with the same advantage as if stored in a distillery warehouse of his own, and where they may be sold or pledged by means of warehouse receipts, which cannot be questioned, without the necessity of resorting to receipts of his own, which are only such in name."

This argument involves several misapprehensions of fact and law. Whiskey stored in the general bonded warehouses, loses the advantage of the bottling regulations of said statutes and loses the advantages of being aged under the care and direction of the distiller as to handling, temperature, etc. The transportation charges and handling charges must be paid, on the shipment from the distillery to such warehouse. Moreover, no general bonded warehouse has ever been established in the collection district in question; in fact the nearest general bonded warehouse is located at Pittsburgh, Penna. There are only twelve general bonded warehouses in the entire United States, and the total capacity of the entire twelve would hardly be sufficient to hold the output of a single large distillery.

The Commissioner of Internal Revevnue some years ago refused permission to establish a General Bonded Warehouse in Cincinnati, the largest whiskey market in the United States, on the ground that there was no necesity for it; he also abolished such a warehouse in Richmond, Virginia, by withdrawing the permit. These general bonded warehouses have no advantages over any other warehouse except that payment of the tax need not be made in advance, and outage allowances are granted. Moreover, the guaranty of genuineness, etc., from being stored in these distillery warehouses, a most important consideration, is lost.

If the argument with reference to the general bonded warehouse is meant to be an answer to the argument of inconvenience, and to the custom and usage of the trade, then it would seem that a sufficient reply would be that those familiar with the trade, and in the business, have not found it wise or expedient to use these general bonded warehouses for the purposes for

which distillery warehouses are used. Some of the reasons therefor have been already referred to.

When we consider the complete possession and control of the government over the whiskey; that the owner has no access to it and cannot even see it except by permission of the government; that the manner in which it shall be marked is prescribed by law, and the owner has no right to mark it otherwise; that neither a pledgee nor purchaser, nor the owner of the whiskey can remove it from the warehouse except upon the payment of the tax and must remove it immediately upon payment of the same; that the distiller cannot deliver possession of the whiskey to a third person except as provided by law; and the absence of even a semblance of exclusive possession on the part of the owner; it would seem that the only method of constructive delivery possible was followed and no person could be injured thereby.

Certainly the creditors of the Distilling Company could not claim that they had been misled to their injury, because they had no access to the interior of the warehouse. They are chargeable with a knowledge of the law, and the provisions of the Federal Statutes. They could not, therefore, possibly have been misled by the presence of the whiskey within the warehouse. They cannot be deemed to have given credit upon the faith of whiskey in a warehouse of which they had no means of ascertaining the contents.

(E) The usages of trade or business.

In consequence of the conditions above discussed, the last consideration named by Justice Brown, "the usages of trade or business," grew up, and the trade

has been habituated to the issue of warehouse receipts with the certificates of the gauger thereto attached, just as was done in this case, to obviate the loss, damage, expense, and inconvenience of actual delivery.

Having regard now to the rule, and the reason for the rule, and the exceptions to the rule, of *Clow vs. Woods*, construing the Statute of 13th Elizabeth, the question presented is: Was this such a case as justified the constructive delivery attempted by these warehouse receipts? The Statute of Elizabeth was intended to prevent fraudulent transfers and conveyances. The decisions hold that where a party retained the possession of personal property which was susceptible of delivery, and for the non-delivery of which there was no reasonable, fair explanation reconcilable with honesty and good faith, the retention of such possession was *per se* evidence of fraud, was constructive fraud, and this, because the retention of such property gave to the vendor retaining the same, a false credit. Having in his possession personal property, he was presumed to own it, and every one was justified in dealing with him upon this supposition. We have seen how the trend of industrial and commercial development made it necessary to depart from the strictness of this rule, until exception after exception was grafted upon the law, and the courts were driven to say that there is no unbending test of the sufficiency of delivery and retention of possession, but that, in passing upon the question, regard must be had to the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties, and the usages of trade or business.

The reason for the rule making fraudulent as against creditors transfers of personal property unaccompanied by actual delivery is based upon the fictitious credit permitted by allowing possession to remain in the debtor.

The reason and the rule alike cease where credit could by no possibility have been given upon the faith of the possession of the goods.

It has been shown above that the actual possession of the whiskey in controversy was not in the bankrupt.

In whose possession was the whiskey?

The necessary elements of possession have been noted, *supra*.

With subtle and searching analysis it is argued, that the possession of the spirits is not technically in the storekeeper or the Government, notwithstanding that the distiller cannot get at it, and the Government officials are the only ones who can.

The reason for the rule requiring physical possession to be taken of the goods, fails where the goods are not in the actual possession and control of the debtor, irrespective of the character of possession and control of the third person. It is not because the third person is technically a bailee, it is because the debtor is no longer in the possession of the goods. The goods might be in the possession of a policeman or of a thief, they could be sold by the real owner, and an order given therefor which would pass title to the purchaser. The

controlling factor is not the character of the other's possession, but the fact that there is no deceptive possession in the debtor.

If there were the slightest suggestion of actual fraud, the situation would be entirely different. There is no pretense that the appellee was not a holder in good faith and for a valuable consideration. Unless the court is obliged to hold that there was legal or imputed fraud, notwithstanding the conceded good faith of the transaction, the inquiry resolves itself into: What was the legal effect of the transaction as between the parties?

Is there any doubt that a buyer or pledgee as against the seller or pledgor may insist upon the delivery of the goods?

If under the decisions of the Supreme Court of Pennsylvania and the custom of the trade, and the substance of the transaction as it would be regarded by the people, it is held that the possession of the goods was sufficiently out of the distiller so that the transaction need not be denounced as legally fraudulent, it is at once evident that as between the bankrupt and the bank, the latter is in law and in equity entitled to its bargain.

As between the parties, the pledgee's rights to the goods, no equities having intervened, must be likewise superior to the pledgor's. Does he not get title subject to the pledgor's right to redemption? As between the parties, if the pledgor retakes the subject of the pledge, without paying the money he has been loaned thereon, his act is wrongful, whether the goods are in his pos-

session or in the possession of a third person. Is he not guilty of conversion? If technically not guilty of conversion because of the absence of any necessary legal elements, yet in substance the pledgor's rights must be subject to the pledgee's rights to reduce the pledge to actual possession, unless equities have intervened.

The agreement of pledge necessarily involves an assignment or transfer of the goods, the pledgee to hold them as security for the payment of a debt, the only right of the pledgor being to pay the debt and redeem the goods, or to the excess in the event of sale.

A pledge unaccompanied by possession may be defeated by an innocent third party, but the pledgee having parted with his money, has the right of possession and the right to reduce to possession as against the pledgor.

A transfer of property in the hands of a bailee is good against the creditors of the owner without actual delivery.

Linton vs. Butz, 7 Pa., 89 (1849);
Worman vs. Kramer, 73 Pa., 385 (1873);
Woods vs. Hull, 81 * Pa., 453 (1875);
Caulfield vs. Van Brunt, 173 Pa., 433 (1896).

The form of the transaction is immaterial, if the intent is clear to make the chattel security for the present advance. The substance is the same as if the pledgor had said: "I assign, transfer, and set over said goods, and I agree that you may forthwith reduce same to physical possession."

The pledgor cannot thereafter be permitted in honesty or good conscience to deny the pledgee's right of possession, or to interfere with his right to reduce to possession. There is commercially an implied duty to aid the pledgee in obtaining possession. Whether the pledge be of shares of stock, the certificate for which is in the hands of another, or of property seized by officers of the law, or of a horse stolen and placed wrongfully in another's livery stable, the pledgee would clearly have the right as against the pledgor to reduce to possession.

Possession may be held by a third person for the pledgee when such person will be considered as the pledgee's agent.

Brown vs. Warren, 43 N. H., 430 (1862);
Tibbetts vs. Flanders, 18 N. H., 285 (1846);
McCready vs. Haslock, 3 Tenn. Ch., 13 (1875);
Johnson vs. Smith, 11 Humph. (Tenn.), 396 (1850);
Weems vs. Delta Moss Co., 33 La. Ann., 973 (1881);
First Nat. Bank vs. Harkness, 42 W. Va., 156, 166; 24 S. E. Rep., 548 (1896);
Lewis vs. Dillard, 76 Fed. Rep., 688; 22 C. C. A., 488 (1896).

"We have observed for several years a growing laxity on the part of judges and jurists in the application of the principles of constructive pledge delivery, until now it must be confessed there are authorities of great weight and respectability that hold that, as between the parties themselves, an actual delivery may not be necessary and that the

possession may be regarded constructively where the contract places it."

Per Mr. Justice Loomis in *Huntingdon vs. Sherman,* 80 Conn., 463, 467; 22 Atl. Rep., 169 (1891).

See also *Tuttle vs. Robinson,* 78 Ill. 332; and *Martin vs. Reid.,* 11 C. B. (N. S.), 730.

"Where personal property is pledged the pledgee acquires the legal title and the possession. If it remain in the apparent possession of the pledgor, he holds as agent of the pledgee."

Syllabus in *Easton vs. German American Bank,* 127 U. S., 532 (1887).

It has been stated in the opinion of Judge Archbald that there is possibility of duplication and fraud, and that, when once the taxes have been paid, the government officials in charge cannot restrain the distiller, no matter what receipts or certificates are known to be out, from disposing of the goods in the distillery warehouse to whomsoever he may choose, and he adds, "and this is the whole case."

It may be with propriety suggested, the same statement would be true of any warehouseman, (who would not even have to pay any taxes) if the goods were stored in a public warehouse. Notwithstanding the issuing of warehouse receipts, notwithstanding the fact that he has no claim or title to the property whatsoever, nevertheless, if he is dishonest he can sell and dispose of the goods to whomsoever he may choose. There is as much possibility of duplication and fraud in

the issuing of receipts in the case of a general public warehouseman as there is in the issuing of receipts by a distiller for goods in storage in the distillery warehouse. Duplication and fraud in both cases presuppose dishonesty, for which there are penal statutes, and in neither case can there be duplication or fraud without the commission of crime.

The statement in the opinion of Judge Archbald, "the possibility of duplication and fraud, of which there are examples enough in the books, to say nothing of what is reported to have occurred here, is sufficient to condemn the custom, if there was nothing more," was evidently written upon a misapprehension.

In the State of Pennsylvania, notwithstanding the fact that in the last 45 years there have been hundreds of millions of such certificates issued, the cases of fraud that can be found in the books are, in comparison, fewer than the cases relating to the commission of almost any other crime prohibited by the criminal law of this State. A search of the reports discloses so very few cases that this statement of the learned Judge is incomprehensible, in view of the millions upon millions of dollars that have been involved.

Moreover, as has already been suggested, the legislature of the State of Pennsylvania, in adopting the "Warehouse Receipts Act" of 1909, and the Commission on Uniform State Laws, which framed that Act, and the legislatures of the various States that have adopted that Act, have by express enactment authorized the issuing of warehouse receipts by warehousemen for goods of their own, stored with themselves; and evidently, therefore, the apprehensions of the learned court are not shared by them.

Let us keep in mind the subject here in controversy. It is whiskey in a bonded warehouse—goods in process of manufacture. Such goods require the care and supervision of the distiller in order to age properly under regulated temperature and conditions. There is no demand for the goods until it is so aged. The whiskey is not marketable for actual consumption until properly aged. It is totally unfit for consumption until so aged. The goods are in process of manufacture and this alone justifies the retention by the pledgor. The government does not permit the whiskey to be bottled in bond until it is at least four years old. The goods cannot be removed until the tax is paid, and the tax cannot be paid, without loss, until there is an actual demand and market for the whiskey. Meanwhile the whiskey cannot be touched by any one except in the presence of the revenue officers of the federal government. The locks, keys and bolts are absolutely controlled by these officers. Every reason of policy and prudence, safety, necessity, and usage of business, require that the whiskey be retained in the warehouse, so that its manufacture into a finished product for consumption can be completed, and so as to guarantee its genuineness and freedom from adulteration, and so that it can be bottled in bond, if desirable, and so that the "outage" allowances can be deducted. The purchaser or pledgee who keeps his whiskey in bond in the distillery bonded warehouse can by reason of his advantages undersell any one who removes the same. The advantages are so great, almost equalling indeed the original cost of production, as to amount to a handsome profit.

Under these circumstances, and under the peculiar conditions affecting bonded warehouses, whether the

certificates, bills of sale, or receipts, be warehouse receipts or not, they are a sufficient symbolical delivery to comply with the law of Pennsylvania. The usage of trade for many years has sanctioned such symbolical delivery. The character of the property, *i. e.*, whiskey newly distilled, goods in process of manufacture; the use to be made of it, namely, to be sold for consumption when properly cured and aged; the nature and object of the transaction, to wit, the purchase of whiskey to be kept in bond, to be cured and aged without the loss of interest by paying taxes, and with absolute guarantees of genuineness and freedom from adulteration, and with the opportunity of benefiting by the "outage" allowances; the position of the parties, that is to say, the one a distiller, keeping such bonded warehouse, the only party who can cure and properly age such whiskey, and the other party the dealer who buys to sell again, or to use when ready for use, or to hold as security for a debt until it is ready for sale or use; and the usages of the trade or business, viz: exactly what was done in this case as an unbroken custom for nearly half a century; all conspire and unite to establish that the retention of possession by the distiller in his warehouse was for a purpose fair, honest and essentially conducive to the object the parties had in view and which constituted the motive for entering into the contract.

III.

ESTABLISHED TRADE CUSTOMS, WHEN LONG CONTINUED AND UNBROKEN, BRING WITH THEM STRONG PRESUMPTIONS OF THEIR LEGALITY AND VALIDITY.

Counsel submit that it is the unbroken usage and custom of the trade to treat distillery bonded warehouse receipts as technical warehouse receipts, and to sell and pledge them freely and without question, in reliance upon the assumption that they represent the whiskey. Much has already been said in this brief of argument on this subject and repetition will be avoided as far as possible.

A custom of trade once established and recognized should not be lightly stricken down by the court. It is entitled to every presumption in favor of its reasonableness and validity. The best law often finds its basis in the usages and customs of the people. Such customs must yield to express statutory provisions, or established public policy, but when reasonable they should be encouraged rather than destroyed by the Courts. The trial court found that:

> "It is the unbroken custom of the trade—the evidence leaves no doubt upon this point—to treat storage receipts for spirits as completely equivalent to the spirits themselves and to sell or pledge them freely and without question."

This brings us to the not unimportant considerations, that founded upon this statute of the United

States, and in promotion of its general purpose, the custom and usage, of which these records compel us to take notice, has grown up in the trade, to freely buy and sell whiskey in such bonded distillery warehouses, such sales being evidenced by the delivery of these storage certificates and so-called warehouse receipts, in lieu of the physical possession which the distiller or owner is incapable of delivering without a surrender of the privileges the statute was intended to provide. In his opinion in the Taney case, the learned judge (McPherson) of the court below finds as a fact that the evidence leaves no doubt upon the point, that it is the unbroken custom of the trade to treat these storage certificates as completely equivalent to the spirits themselves, and to sell or pledge them freely and without question. In so far as the custom sanc[illegible]s the underlying sale and purchase of whiskey thus situated, and recognizes these certificates and so-called warehouse receipts as evidence thereof, the custom is reasonable and within the philosophy of the rule which dispenses with the necessity of delivery of physical possession, where the possession is not in the vendor but in a third person for a lawful purpose, and the non-delivery is consistent with the honest intent and object of the sale. So that, even if this custon of the trade of long continuance, and reasonable in itself, were in some particulars inconsistent with the general rule of law, but not conflicting with any settled public policy, it might settle the question in hand. From what we have said, it is apparent that it is not inconsistent with either public policy or public law in the state of Pennsylvania.

The rule is thus stated in 12 Cyc., 1053:

"It is laid down in a number of cases that a custom or usage in opposition to an established

rule of law is void and of no effect. But this is not correct. It was no objection to a common-law custom that it was contrary to the common law of the land. And a custom or usage of trade or of a particular place is not inadmissible because it is contrary to the principles of law governing such cases; for it is obvious that if proof of a usage could be rejected because it established something different from the law no custom would ever be proved, because if it were not different it would be a part of the law. Nevertheless usages and customs have been rejected because inconsistent with established rules of law. This apparent contradiction has been explained as follows: The meaning of the rule that a usage or custom must not conflict with the law is clear and the rule itself easy of application. A usage or custom is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relation to each other; if in short it is unjust, oppressive, or impolitic usage, then it will not be recognized in the courts of justice, for it will lack one of the requisites of a valid custom, viz: reasonableness."

In hundreds of instances and thousands of citations, customs have been recognized as conferring rights different from or in addition to those existing under the general law: 12 Cyc. 1061, *et seq.*

The case of *Priestley vs. Pratt*, L. R. 2 Ex. 99, 102, is a good illustration of this principal. That was a

case of trover by the buyer to recover from the seller's assignees in bankruptcy lambs and pigs left in the hands of the bankrupt. The buyer proved a custom well known with the trade to leave goods in the possession of the seller for a reasonable time after they were purchased. The assignee sought to hold the property on the ground that the animals were in "the disposition of the bankrupt at the date of his bankruptcy." On this question it was said by

KELLY, C. B.:

> "That question depends in all cases on whether there is shown to exist with respect to the articles in question, any custom of trade, so notorious as practically to be known to all who do business with those dealing in such articles, and who are called upon to consider the question of giving credit to them, by virtue of which goods, in reality the property of others, are allowed to remain in the actual possession and physical power of disposition of the bankrupt. Looking at the circumstances of this case, it is difficult to imagine a stronger case of a notorious custom—notorious to all who are acquainted with the practice of farming. There is here no question of opposing evidence, but the jury themselves interpose in the course of the evidence, and say that the custom is so notorious as to make the evidence unnecessary. On this finding it must be taken that the custom was known to all who might be prejudiced by the apparent ownership; and that any one who was about to give credit to a farmer would not take it for granted that all the cattle he saw upon the farmer's land were his own, and give credit on that footing, but conjecturing that they might be the property of others, would exercise a corresponding caution. * * *

Without relying on *Re Terry*, 7 L. T. N. S. 370, in the Bankruptcy Court, although that case was decided by a very learned person, of great experience in this branch of law, the case of *Prismall vs. Lovegrove*, 6 L. T. N. S. 329, in conformity with other modern cases, establishes that wherever a custom exists so notorious that it may be presumed to be known to all persons engaged in the business, that the buyer should leave the goods bought in the hands of the seller for a certain time, and they are not left for a longer time than is clearly within the custom, they are taken out of the reputed ownership clause, and the buyer is entitled to recover them from the assignees in bankruptcy of the seller. The present case falls within that description, and the plaintiff is therefore entitled to recover."

See also *Ghen vs. Rich*, 8 Fed., 159.

Trespass for entering plaintiff's close and erecting stalls, booths, etc., there. Defendant justified under a custom that at fairs held on some part of the commons of a manor, to be named by the lord of the manor, every liege subject exercising the trade of a victualler might enter at the time of the fairs, and for the more conveniently carrying on his said trade, erect a booth, etc. *Held*, The custom was reasonable, Tindall, C. J.

"A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex certa causa rationabili usitata privat communem legem*' (Co. Litt. 113 A), as the custom of gavelkind and borough English, which are directly contrary to the

law of descent, or, again, the custom of Kent, which is contrary to the law of *escheats.*"

Tyson vs. Smith, 9 A. & E., 406-421 (1838).

"It has been fully proved to exist by all the witnesses. Its reasonableness depended upon the proof of its general use and indeed I might say, upon its being established as a general custom. For, the proof of a general custom furnishes a strong reason why we should regard it as reasonable. It must be sanctioned by general concurrence with use for several years before it can be said legally to exist. If it was unreasonable, and of course without necessity, reasonable and prudent men would not continue to peril both life and property to give it existence. From proof of it as the general custom of the trade, we are bound, at least *prima facie,* to conclude that it is reasonable."

Cox, Maitland & Co. vs. The Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331 (1832), page 333.

"A custom is not unreasonable merely because it is contrary to a particular rule or maxim of the common law."

12 Cyclopedia of Law and Procedure, page 1084.

Lord Kenyon, Ch. J.

"It is no objection to a custom that it is not conformable to the common law of the land, for it is of the very essence of a custom that it should vary from it."

Horton vs. Beckman, 6 T. R., 760 (1796), page 764.

The Supreme Court of Pennsylvania, in the case of *Miller vs. Browarsky*, 130 Pa., 372, (1889) recognizes this custom of the trade whereby a system regulating the transfer of bonded whiskey by means of certificates called warehouse receipts had been adopted.

And whether or not the custom of the trade has the force and effect of law, it negatives any charge of constructive fraud. It is to be assumed that those in the trade and those dealing with the trade knew of the usages thereof:

Guillon vs. Earnshaw, 169 Pa., 463 (1895).

The creditors, therefore, knew that the whiskey might have been sold or pledged and customarily was sold and pledged to raise money for the prosecution of the business.

"The usages of a trade or business" are to be considered in passing upon the sufficiency of symbolical delivery and retention of possession.

White vs. Gunn, 205 Pa., 229 (1903).

When a trade usage has existed for many years and has been uniformily acquiesced in by all, it means that it has been long regarded by the mass of mankind as fair and reasonable, and as furnishing the true rule for best adjusting the rights and equities of those affected thereby. These usages and customs represent the unanimous consent of the particular trade as to the most practical method of transacting business. Here the practice was predicated on the foundation right to permit the whiskey to remain in bond, and the substantial, indeed indispensable, advantages attendant

upon this right. As the crystalized common sense of the commercial community, such a custom carries with it the strongest presumption of reasonableness and validity.

IV.

THE TRANSACTION WAS NOT FRAUDULENT IN FACT, AND THE WHISKEY IN QUESTION NOT BEING SUBJECT TO EXECUTION ON ACCOUNT OF THE CUSTODY AND POSSESSION OF THE GOVERNMENT, THE TRUSTEE'S RIGHTS ARE NOT SUPERIOR TO THOSE OF APPELLEE AS A BONA FIDE HOLDER FOR VALUE PRIOR TO THE DATE OF THE ADJUDICATION IN BANKRUPTCY.

It has already been fully established by the facts and argument in this case, that the transaction was not fraudulent in fact. In reality there is no such contention in this case. Under such circumstances what, if any, rights can the trustee in bankruptcy have as against the pledgee, that are superior to those of the bankrupt? If he has any such rights they must arise out of the provisions of the bankrupt act. An assignee for the benefit of creditors would have no such rights. There being no actual fraud, the transaction being entirely free from dishonest purpose in accordance with

the custom and usages of the trade, the pledgee having paid and the pledgor having received full consideration, if the trustee in bankruptcy is to have rights to rise above considerations of fairness and honesty as between the parties and he can ignore this transaction, which the parties themselves were bound to observe, it must be on account of some specific provision of the bankrupt law.

The pledgee was a bona fide holder of the whiskey for value and in due course of business prior to the date of the adjudication. The property was not pledged in fraud of creditors. The proceeds of the loan to the bankrupt went into its general estate. The trustee cannot then be vested with title to the whiskey as being "properly transferred by the bankrupt in fraud of his creditors;" this applies only to actual fraud, not to constructive fraud. (Bankruptcy Act, section 70a—4.) Nor can the trustee claim it as "property, which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial proceedings against him." (Id., section 70a—5.)

The property could not have been levied upon and sold under judicial process against the bankrupt, because whiskey in a distillery bonded warehouse is not subject to levy.

Fischer vs. Dohistal, 9 Fed. Rep., 145 (1881).
McCullough vs. Large, 20 Fed. Rep., 309 (1884).

Whiskey in a bonded warehouse is not subject to levy.

There was no actual fraud.

There was no such "legal fraud" as would have permitted creditors to levy upon the whiskey.

The bankrupt was not in any way given a fictitious credit.

The buyer is only obliged to take the possession of which the subject matter is reasonably susceptible.

Many things excuse delivery of possession if the purpose of the transaction is fair and honest.

One excuse in particular is that goods were in process of manufacture.

These goods were in such process.

There was therefore no constructive fraud.

White vs. Gunn, 205 Pa., 229 (1903);
McCullough vs. Wiley, 200 Pa., 172 (1901);
Williams vs. Mill, 174 Pa., 299 (1896);
Goddard vs. Weil, 165 Pa., 419 (1895);
David vs. Oxenrides, 43 Pa. Super. Ct., 506 (1910);
Gibson vs. Stevens, 8 How. (U. S.), 384 (1850);
Whittle vs. Phelps, 181 Mass., 317 (1902);
Mercantile Co. vs. Schulz, 56 Wash., 393 (1909);
Kingsley vs. White, 57 Vt., 565 (1885).

The provisions of the Bankruptcy Act, relating to the rights in the bankrupt's property to which the Trustee succeeds, have been interpreted and applied in a number of cases.

In *Security Warehousing Co. vs. Hand*, 206 U. S., 415, 423 (1907) it was said by Mr. Justice Peckham:

> "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt. This has been the rule under former acts and is now the rule. *Hewitt vs. Berlin Machine Works*, 194 U. S., 296; *Thompson vs. Fairbanks*, 196 U. S., 516, 526; *Humphrey vs. Tatman*, 198 U. S., 91; *York Mfg. Co. vs. Cassell*, 201 U. S., 344, 352."

And in the case of *In re Garcewich*, 115 Fed., 87 (1902), it was said by Wallace, C. J.:

> "Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. *Winsor vs. McLellan*, 2 Story, 492, Fed. Cas. No. 17,887; *Allen vs. Massey*, 17 Wall., 351, 21 L. Ed., 542; *Donaldson vs. Farwell* 93 U. S., 631, 634, 23 L. Ed. 993; *Yeatman vs. Institution*, 95 U. S., 764, 24 L. Ed. 589; *Adams vs. Collier*, 122 U. S., 382, 7 Sup. Ct., 1208, 30 L. Ed., 1207; *Norton vs. Hood*, 124 U. S., 20, 8 Sup. Ct., 357, 31 L. Ed., 364; *Chattanooga Nat. Bank vs. Rome Iron Co.*, (C. C.) 102 Fed., 755. It is not the meaning of the present act that the institution of proceedings in bankruptcy should se-

cure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims. Section 70 declares in express terms that the title of the bankrupt shall vest in the trustee to 'all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

It is submitted, therefore, that there being no fraud in fact, and the whiskey in controversy not being subject to execution (on account of the custody and possession of the government for the collection of taxes), the trustee's rights under the bankruptcy act are not in any way superior to those of the bank. The bank being a *bona fide* pledgee for value in due course of business, by the delivery of the warehouse receipts for the whiskey in controversy, for a loan obtained from it before the adjudication in bankruptcy, is entitled to said whiskey as against the bankrupt, his trustee, and his creditors, there being no provision in the bankruptcy act changing the law as heretofore existing on this subject.

Since this case was decided by the Circuit Court of Appeals, there have been two cases in the Federal courts, both reported in 196 Fed. Rep., namely, *Pattison vs. Dale*, 196 Fed., 5 (Circ. Ct. of App., 6th Circ.), and *Merchants National Bank vs. Distilling Company*, 196 Fed., 76, (Maryland Circuit).

In the Pattison case, Warrington, C. J., delivering the opinion of the Court, says, at page 11:

"There is much controversy, however, touching possession of the whiskey; Pattison claiming that it is in the government, and the trustees that it was in the distiller and is now in them. This results in contention on the part of the trustees that the distiller was nothing more than his own warehouseman respecting his own warehouse receipts. The argument assumes the question. It treats Rohrer's relations to the warehouse and whiskey precisely as if his custody and control were absolute and exclusive. It will not do to say either that he was in actual possession, or that he could (without paying the tax and losing the opportunity given to age the spirits) effect a physical change of possession. *Union Trust Co. vs. Wilson, supra* (198 U. S., 530, 25 Sup. Ct. 766, 49, L. Ed. 1154). The most that he could do was, in virtue of his title, to give constructive possession through symbolic delivery; and then only subject to the rights of the government. And this seems to be just what he attempted to do; for the receipts were given in 'conformity' with the laws of the United States, and each contains an agreement that the pledgee shall supply the money to pay the excise tax."

* * * * * * * *

"Nor is the claim tenable that the whiskey gave credit to the distiller, and the pledge operated to defraud his general creditors. The whiskey was not visible. The public had no access to the warehouses. *Taney vs. Penn Nat. Bank*, 187 Fed., 703, 109 C. C. A., 437 (C. C. A., 3rd Circ.); *Union Trust Co. vs. Wilson, supra*, 198 U. S., 538, 25 Sup. Ct., 766, 49 L. Ed. 1154."

* * * * * * * *

"There is also to be added the weight and effect of the custom respecting the pledge of whiskey deposited in distillery warehouses. The averments in this behalf are set out in the answer and cross-petition and of course so far as well pleaded are admitted by the demurrer. They are to the effect that these transactions were had in accordance with a custom of trade of more than 40 years' standing, extending throughout the country; that under the custom, distillers, bankers, brokers and dealers in whiskey have during that time treated warehouse documents like these as giving constructive possession of the barrels of whiskey and as conveying an interest in the whiskey according to the nature of the transaction; and that the receipts have been treated as transferring, through indorsement, the rights of the original holders of the whiskey described in them. We cannot under the pleadings accept the suggestion that this custom rests on or is affected by a statute of the State of Kentucky."

* * * * * * * *

"Furthermore, instruments similar to those now in issue have been recently upheld in well considered decisions. In *Taney vs. Penn Nat. Bank*, 187 Fed., 689, 702, 109 C. C. A., 437, 450 (C. C. A., 3rd Circ.), Judge Gray cogently discussed the question of the sale of whiskey stored in distillery warehouses."

* * * * * * * *

"*Merchants' National Bank of Baltimore vs. Roxbury Distilling Company*, 196 Fed., 76, was brought in the Circuit Court of the United States for the District of Maryland, and decided by Mr. John Hinkley, Special Master. Distillery warehouse receipts given in pledge were sustained. A

statute of Maryland provides that all warehouse receipts issued by a United States distillery warehouse shall be governed by and be subject to the state act as fully as are the warehouse receipts of any warehouseman. Irrespective of the statute, the master said:

> 'It seems clear to me that there is adequate reason for recognizing the validity of distillery warehouse receipts which has been given to them by long course of dealing by the traders and the banks, and that this contention should prevail. It is a growth and development of the doctrine of constructive or symbolical delivery which I have attempted to trace in this opinion, and of the underlying principle that the courts will recognize as constructive delivery that form of delivery which the character and situation of the goods imperatively requires.'

He reached the conclusion that the receipts 'are valid not only inter parties or against solvent distillers, but absolutely as vesting title in such purchasers or liens in favor of such pledgees, against subsequent creditors.' "

In the case of the *Merchants National Bank vs. Roxbury Distilling Company*, 196 Fed., 76, at page 101, Morris, D. J., says:

> "By the Maryland Code all warehouse, elevator or storage receipts whatsoever for goods deposited are declared to be negotiable instruments, and full and complete title to the property therein mentioned shall vest in the *bona fide* holder for value.

"But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States.

"I will not prolong this opinion by a recital of those circumstances or of the reasons why a constructive delivery should result from the issuing of such warehouse certificates. It will be sufficient to refer to the very able discussion of the question in the opinion of the special master returned to the court in this case, and to the learned and convincing opinion of Circuit Judge Gray in the Circuit Court of Appeals for the Third Circuit in *Taney vs. Penna. Nat. Bank of Reading,* 187 Fed., 689, 109 C. C. A., 437.

"It appears that this constructive delivery is commonly made use of by those dealing in whiskey, and money is loaned on pledges of the certificates by banks and others in sums of great magnitude. This is so because whiskey usually must be kept in the distillery warehouse five years to mature, and in no other way could the necessary money be raised and the whiskey itself be commercially dealt with except by the use of these warehouse certificates representing the whiskey.

"The rules of commercial law are built up upon the actual dealings which have the sanction of honest and competent merchants and which are necessary to carry out honest transactions in the fairest manner.

"The Maryland Court of Appeals in several cases involving the proper taxation of whiskey stored in distillery warehouses has recognized the holder of the warehouse certificate as the owner of the whiskey. *Monticello Distillery Co. vs. Baltimore City,* 90 Md., 416, 45 Atl., 210; *Fowble vs. Kemp,* 92 Md., 637, 48 Atl., 379; *Carstairs vs. Cochran,* 95 Md., 488, 52 Atl., 601; *Carstairs vs. Cochran,* 193 U. S., 10, 24 Sup. Ct., 318, 48 L. R. A., 596; *Hannis Distilling Co. vs. Baltimore,* 216 U. S., 285, 30 Sup. Ct., 326, 54 L. Ed., 482."

V.

THE SUPREME COURT OF PENNSYLVANIA, THE SUPERIOR COURT, AND THE COURTS OF NISI PRIUS OF SAID STATE, HAVE CONSTRUED THE ACT OF 1866 RELATING TO WAREHOUSE RECEIPTS, AND HAVE, WITHOUT EXCEPTION, SUSTAINED THE VALIDITY OF THESE BONDED DISTILLERY WAREHOUSE RECEIPTS, AND HAVE HELD THAT RECEIPTS OF THE CHARACTER AND FORM, AND ISSUED UNDER THE CIRCUMSTANCES OF THOSE IN CONTROVERSY HERE, ARE WAREHOUSE RECEIPTS WITHIN THE MEANING OF SAID ACT, AND PASS TITLE BY DELIVERY.

The warehouse receipts in controversy are documents of statutory origin and their force and effect involve the construction of a state statute.

The Act of Assembly of Pennsylvania of September 24, 1866, P. L. (1867), 1363; *Stew. Purd. Dig.* vol. 1, page 393, *inter alia*, provides:

> "Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, petroleum or other commodities, stored or deposited with any warehouseman, wharfinger or other person in this state, or bills of lading, or receipts for the same, when in transit by cars or vessels to any such warehouseman, wharfinger or other person, shall be negotiable, and may be transferred by endorsement and delivery of said receipt or bill of lading; and any person to whom the said receipt or bill of lading may be so transferred, shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon; and no property on which such lien may have been created, shall be delivered by said warehouseman, wharfinger or other person, except on the surrender and the cancellation of said original receipt or bill of lading; or, in case of partial sale or release of the said merchandise, by the written assent of the holder of said receipt or bill of lading, endorsed thereon; *provided*, that all warehouse receipts or bills of lading, which shall have the words, 'not negotiable', plainly written or stamped on the face thereof, shall be exempt from the provisions of this act."

This statute has been construed and applied in many cases in this state.

The Supreme Court of Pennsylvania (in a case within its jurisdiction), and the Superior Court of the

State (in a case of which it had final appellate jurisdiction), have held that receipts issued by distillers for whiskey in a bonded warehouse (receipts of the exact description of those in controversy here), were warehouse receipts under said Act of 1866. Other Courts of the State have followed these decisions; no State Court has decided otherwise, and the trade has conformed its practices to such interpretations, and thereby established a uniform, unbroken custom, of long duration.

In *P. Keil et al. vs. L. H. Harris,* decided by the Supreme Court of Pennsylvania, November 15, 1886, 4 Sadler's Penna. Sup. Ct. Cases, page 201, 5 Cent. Rep., 865, it was held in a Per Curiam opinion:

> "The Whiskey in controversy, being in a bonded warehouse, was properly delivered by Vandergrift & Brother, by their certificate or bill of sale, to Miller, Forge & Company, under and by virtue of which the defendant claims."

The action was for damages for the conversion by defendant, Harris, of two lots of fifteen and twenty-five barrels of whiskey, respectively. Vandergrift & Brother were distillers at Fredericktown, Washington County, They sold the whiskey in controversy, which was stored in their own bonded warehouse, and delivered their own warehouse receipts with gauger's certificates for the same to the purchaser. The whiskey remained in said distiller's own bonded warehouse on storage. On a judgment against Vandergrift & Brother, the distillers and warehousemen, an execution was issued, and a levy made upon the whiskey in their bonded warehouse. The sheriff sold the whiskey and plaintiff purchased it at an execution sale. Defendant did not pay the tax and take the whiskey out of bond until a month later. The trial

judge directed a verdict for the defendant. In the Supreme Court, the point was distinctly made by appellant,—"A distiller is not a warehouseman within the meaning of the Act of Assembly of September 24, 1866 (Purdon's Digest, 145.) He is no more a warehouseman than is any other manufacturer who keeps a warehouse at his place of business, and in which he stores his product exclusively. A warehouseman, as contemplated by the Act of 1866, is a person who receives and stores goods as a business for compensation or profit. *Bucher vs. Com.*, 103 Pa., 528" (1883). Counsel for appellant further argued that under the Second Section of the Act of 1866, the issuance of a receipt by such distiller was contrary to the provisions of the Act and that the transaction for want of actual delivery was fraudulent and void as against execution creditors. Counsel for the appellee replied, referring to the Acts of Congress: "While the distiller is not wholly excluded from the warehouse, he is not allowed access thereto except in the presence of the storekeeper, who carries the keys and has charge and control of the warehouse. It is plain, therefore, that no actual delivery of the whiskey was practicable," etc.

No other question was presented to the Supreme Court in that case, except the proposition as to whether or not the Pennsylvania Act of 1866 authorized the issuance of such warehouse receipts.

Judge Archbald, in his opinion in this court, said:

"Neither is *Keil vs. Harris*, 5 Cent. Rep., 865, (1886) necessarily the other way. It was assumed in that case, that, by the deposit of the whiskey in the warehouse of the distiller, there was a bailment to the Government which, as we have seen, is not

so, and it is upon this mistaken assumption that the case proceeds. But, in addition to that, the defendant, who held the certificates which were sustained, had paid the tax on the whiskey and procured it to be delivered to him, against which the plaintiff had merely an attempted levy and sale."

Judge Archbald asserts that the Supreme Court of Pennsylvania made a mistake in assuming that the deposit of the whiskey in the warehouse constituted a bailment to the Government. The question is not as to the basis of the Supreme Court's decision, but as to what it decided. This Court has no power to analyze the reasoning of the Supreme Court of Pennsylvania by which that court under a statute of that state reached a conclusion sustaining the validity of distillery warehouse receipts, and then, because it does not approve of the reasoning, refuse to follow the decision. The case is binding upon this court irrespective of the soundness of the reasoning upon which it was based. This is not an appeal from its judgment. To further examine the grounds of their conclusion would be to nullify the rule making their decision binding on the Federal Courts. Moreover, Judge Archbald is himself mistaken when he says that the defendant had paid the tax and procured the delivery to himself against which the plaintiff had merely an attempted levy and sale. There was in fact a levy and sale under execution a month before the defendant paid the tax and procured the actual delivery of the whiskey to him. No rule had been taken to set aside the sheriff's sale, and the Supreme Court in its opinion ignores this immaterial fact and bases its decision squarely on the law of proper delivery by means of the warehouse receipts.

The Superior Court, in the case of *Sloan vs. Johnson*, 20 Pa. Super. Ct. Reps., p. 643, (1902) which was assumpsit on warehouse receipts issued by a distiller for whiskey stored in a distillery warehouse, in an opinion, delivered by Judge William W. Porter, July 10, 1902, said:

"This action is brought for the value of fifty barrels of whiskey. The plaintiff's claim is founded upon ten warehouse receipts issued by the defendant, who is a distiller and warehouseman.

* * * * * *

"By the provision of the Act of September 24, 1866, bills of lading and warehouse receipts are made negotiable and transferable by endorsement and delivery. The two documents are affected by the same provisions. The defendant contends that the act provides the only method of transferring title to the goods, namely, by endorsement and delivery of the document representing the goods, and that the absence of endorsement upon the receipts in this case, prevented the passage of title to Sloan. This position cannot be sustained. As to bills of lading, it has been held that where the intention of the parties is clear, delivery of a bill of lading without formal endorsement transfers the title to the goods: *Richardson vs. Nathan*, 167 Pa., 513; *Harrison vs. Mora*, 150 Pa., 481; *Holmes vs. German Security Bank*, 87 Pa., 525. No reason is apparent why the same rule should not apply to warehouse receipts. In the case before us, the plaintiff is uncontradicted in his proof that he paid value and received the receipts with intent by both parties that title should pass."

This case holds that the receipts issued by the distiller for whiskey distilled by and belonging to him stored in his own bonded warehouse, were warehouse receipts under the Act of 1866, and that the distiller was a warehouseman.

The Supreme Court of Pennsylvania, in the case of *Miller vs. Browarsky*, 130 Pa., page 372, affirmed the decision of the court below, upon the opinion of R. B. Petty, Esq., referee. In the course of that opinion Mr. Petty, in discussing warehouse receipts issued by a distiller for whiskey in a bonded warehouse, said:

> "As has already been stated, whiskey in bond cannot be actually delivered. It cannot be removed from the warehouse until the tax is paid, but under the law the tax must be paid and the whiskey withdrawn within three years from its entry. As is well known the traffic in bonded whiskey is a very large one and great quantities of bonded whiskey are sold. To hold that these sales would be invalid without actual delivery, would be to hold that a purchaser of bonded whiskey is entirely at the mercy of the distiller, and must trust entirely to his honesty; on the other hand, to hold that all that is necessary is to make a bill of sale, leaves it in the power of a dishonest distiller to sell the same whiskey to a half dozen purchasers, and thus defraud all but the first purchaser. Therefore, the general rule of equity should be applied, and the purchaser required to do all that can reasonably be done to give notice of his title and prevent a second sale.
>
> The testimony shows that the trade has adopted a system regulating the transfer of bonded whiskey by means of certificates called warehouse receipts. These certificates in addition to the cer-

tificates of the distiller that he has sold the whiskey, contain a statement signed by the United States gauger showing the numbers and dimensions of the barrels, the gauge and date of entry. It does not clearly appear that but one certificate of this character is signed by the gauger, but as the only purpose of these certificates is the sale and transfer of the title, the gauger by issuing more than one would be a party to a fraud. It is therefore probable that the gauger will sign but one certificate for each lot of whiskey."

Commenting on the decision in this case, Judge Archbald said in his opinion above referred to:

"Nor does the case of *Miller vs. Browarsky,* 130 Pa. 372, (1889) in any respect sustain the contrary view. The distiller there sold whiskey in his warehouse to the plaintiff, Miller, who took as evidence a receipted bill, but let the whiskey remain in the warehouse undisturbed for three years. And in the meantime the distiller executed certificates, in the form of warehouse receipts against a part of the same to a third party, who transferred them to the defendant, who, from time to time, furnished money to the distiller to pay the tax, and got withdrawal orders from the collector, on which the whiskey was removed. The death of the distiller brought the conflicting claims to light. The plaintiff sued the defendant in trover and conversion, but it was held that he had no case. The plaintiff, it was said, left the whiskey in the absolute control of the distiller, when, by reasonable precaution, by notifying the collector and the storekeeper of his claim, he might have put it beyond the power of the distiller to resell. It is

doubtful whether mere notice to the officers of the Government would have had that effect. But, however, that may be, the fact remains, that, notwithstanding the sale to the plaintiff, and the receipted bill given to him for the goods, which, being prior in time would be superior in right, if the matter was to go by receipts, it was held, that, as against the defendant, who advances money to get the whiskey out of bond, and took the goods, they were of no account."

This case decided that one who obtained a formal warehouse receipt with gauger's certificate attached was preferred in title over one who had nothing but a receipted bill. The case is express authority for the contention that the delivery by warehouse receipt was good and effectual in law against a prior purchaser who failed to obtain such evidence of title although he had paid the purchase price. In any event the decision recognizes the established rule in Pennsylvania that such certificates were warehouse receipts, the delivery whereof passed title to the holder.

Rosenham vs. Batjer, Appellant, 154 Pa., 544, (1893) was a case which involved the transfer of certificates of practically the same form as those in controversy here. They were issued by a distiller from his free warehouse. In a free warehouse, of course, there was no joint custody under the Federal statutes. This case was tried in the Allegheny County Common Pleas before Judge Ewing, who charged the jury, *inter alia,* as follows:

"It is claimed that the case of *Bucher vs. Com.,* 103 Pa., 528, decides that it is not within the Act of Sept. 24, 1866. [Speaking of such receipts.]

We do not think that that case rules this. That was a criminal case, and it was necessary to construe the statute closely, but in that case the form of receipt was entirely different, and the proof was that there was no compensation to be given for storage. Here, on the face of the receipt, Finch & Co. hold themselves out as warehousemen, and on the very face of the certificate there is a storage charge. My impressions are that it is within the act of assembly, and that where a man or a firm in this state hold themselves out as warehousemen, asserting that they are warehousemen, holding goods on storage for a charge, the public have a right to deal with them as such, and that the issuing of such a certificate is of itself an agreement that they are to be governed by the statute of Pennsylvania in relation thereto; and, if that is the case, the verdict should be for the plaintiffs. But it is not necessary, in my judgment, to decide that question in this case, because it seems to me that there is another question in the case which rules it."

He then proceeds to determine the case upon the question of estoppel. The judgment was affirmed by the Supreme Court, *Per Curiam*, January 3, 1893, without any opinion.

In the case of *Exchange Bank of Macon vs. Uhlman-Goldsborough Co.*, 18 Pa. C. C., 252, (1897) in Common Pleas of Dauphin County, in an opinion by Judge McPherson, receipts such as these in controversy here, issued by the Wilson Distillery Company on whiskey in their bonded warehouse, were held to be warehouse receipts negotiable by endorsement, citing as authority *Keil vs. Harris*, and *Miller vs. Browarsky, supra.*

Counsel have been unable to find a single case in the Courts of Pennsylvania—notwithstanding the fact that since the passage of the Act of 1866 hundreds of millions of dollars of said warehouse receipts have been issued and transferred—holding that these receipts were not warehouse receipts under said Act. It has been the universal custom of the trade, affecting hundreds of millions of dollars of such receipts, to treat these securities as warehouse receipts, and it would be difficult to estimate the amount of such securities that are today held by banks, dealers and investors.

If the decision of the Pennsylvania Courts is wrong or against public policy, it can be remedied by the Legislature. One who invests his money on the faith of such rulings, and finds his rights swept away by a subsequent ruling of the same court reversing its previous findings, may rightly complain of a grievous injustice:

Goelpke vs. Dubuque, 1 Wallace, 175 (1861).

Any one is entitled to rely upon such a decision whether based upon erroneous facts or erroneous law, or mixed questions of fact and law, or questions on the borderland between, and when the same question arises in respect of a transaction solely between citizens of the State of Pennsylvania—a Pennsylvania contract in short—the Federal courts should be most careful not to strike down rights *which the State courts would regard as vested.*

The original decision of this court in this case reversing *In re Miller Pure Rye Distilling Company,* 176 Fed., 606, (1910) startled and amazed the trade and their legal advisers.

It is submitted that there is a misapprehension of the power of the Federal Court, on the part of the learned district judge, who wrote that opinion, when he refers to *Keil vs. Harris*, 5 Cent. Rep., 856, (1886) and states:

> "It was assumed in that case that by deposit of the whiskey in the warehouse of the distiller there was a bailment to the government, which, as we have seen, is not so, and it is upon this mistaken assumption that the case proceeds."

Whatever mistaken assumption of law arising from the conception of the relations of the parties the Supreme Court of Pennsylvania may have had, or may have indicated in its opinion, this Court should not reverse the decision of that Court construing a statute of its own state. What controls is its decision. If it has construed the statute of the state, that is conclusive on the Federal Courts. It cannot be contended that the decision in *Keil vs. Harris* was not a specific construction of the statute. In fact no other question was before the Court. No better illustration of the rule of conclusiveness can be given than the case of *Zeiger vs. Pennsylvania Railroad*, 158 Fed. Rep., 809, (1908) decided by this Court. The Supreme Court of Pennsylvania, in construing the Fatal Accidents Act, held that the law did not apply to one who was not a citizen of the State. The reasoning of the court and the basis of the decision were upon mistaken assumptions, both of fact and law. That decision had been followed by only two states in the Union, and practically the courts of every other state, including several of the Federal Courts, have repudiated those mistaken assumptions. This was brought to the attention of this court by counsel, in an effort to induce this court to refuse to follow

that decision, but this court held that until that decision was reversed by the Supreme Court of Pennsylvania, the Federal Courts were bound thereby. And it was so held, notwithstanding the fact that it appeared that the courts in many jurisdictions had demonstrated the mistaken assumptions upon which the Supreme Court of Pennsylvania had acted. Any other rule would make the decision of the Supreme Court of the State of no conclusiveness. In each case there would be a re-examination by the Federal Court, in order to determine the reason and reasonableness of the decision. This would involve a re-examination and perhaps a different construction of the statute.

The foregoing argument is not intended as an admission that the Supreme Court of Pennsylvania was wrong. On the contrary, it is confidently asserted that it was right, as will be later argued in this brief.

As further interpreting the Act of 1866, resort may be had to the subsequent act of the legislature upon the same subject adopted March 11, 1909 (P. L. 19, sec. 1, vol. 5, Stew. Purd. Dig. 5254). This act repealed the Act of 1866.

> "In the interpretation of a statute, it is very well settled that the understanding of it evidenced by the legislature in subsequent enactments is to be treated as of great weight: *Folk vs. State Capital, etc., Assn.*, 214 Pa., 529, and cases cited at page 538."
>
> *National Union Bank vs. Shearer*, 225 Pa., 481.

(By a strange coincidence in the above case of *Bank vs. Shearer*, the Supreme Court of Pennsylvania was considering certain provisions of this very warehouse Act of 1866.)

The Act of 1909 provides that warehouse receipts may be issued by any warehouseman, and that such receipts shall indicate "if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly, or in common with others." The legislature thus clearly indicates its construction of warehouse receipts issued by warehousemen as comprehending and embracing cases where the warehouseman is issuing receipts for his own property,—property owned by himself "solely, or jointly, or in common with others."

In this connection, it may not be amiss at this time to suggest,—although the discussion may be more properly assigned to another place in this brief—that the apprehensions of this court as exhibited in the opinion of Judge Archbald as to the opportunities for fraud and the evil consequences that might follow, from allowing warehousemen to issue warehouse receipts for property of their own, in their own custody, are not shared by the legislature of Pennsylvania, nor by the commission on uniform state legislation which prepared the "warehouse receipts act" adopted by the State of Pennsylvania on the 11th day of March, 1909, nor by the legislatures of other states, which have likewise adopted said act. By the express terms of this recent act, warehouse receipts may be issued by any warehouseman for goods of his own, stored with himself, if the receipt states that it is issued for goods of which the warehouseman is owner, either solely or jointly, or in common with others. The question as to the extent to which actual delivery may be dispensed with as against creditors is a matter of public policy. There cannot be one public policy of the Legislature and another of the Courts in respect of the same subject matter.

"* * * The legislature, which generally determines what is and what is not public policy"

(*Erdman vs. Mitchel*, 207 Pa., 92, 1903) has now explicitly spoken on this very point, and its utterance is authoritative and conclusive.

The other cases in the Supreme Court of Pennsylvania in which the warehouse Act of 1866 is construed, (but not with reference to distiller's warehouses), namely, *Bucher vs. Com.*, 103 Pa., 528, (1883); *Bank vs. Jagode*, 186 Pa., 556, (1898); *Moore vs. Jagode*, 195 Pa., 163, (1900); and *National Bank vs. Shearer*, 225 Pa., 470, (1909), are not in conflict with its specific holding that warehouse receipts issued by a distiller for goods held in storage in his own bonded warehouse, under facts identical with the case at bar, are warehouse receipts under the Act of 1866.

In making the above statement it is not even necessary to rely upon the manifest fact that a bonded warehouse connected with a distillery, by reason of the United States governmental regulations, stands in an entirely different position from the various warehouses discussed in the cases above mentioned.

Bucher vs. Commonwealth was a criminal prosecution arising from the delivery of 366 bushels of corn to a dealer who issued a receipt for the corn "on store." The evidence was conflicting as to whether it was a contract of purchase, or a contract of storage. There was nothing in the receipt to indicate that Bucher held himself out as a warehouseman, or pretended to be a warehouseman, or that the receipt pretended to be a warehouse receipt, except the words "on store" at the end of the receipt, which read: "Received of J. Hettrick, per Kost, 366 48-56 bushels of corn on store. R. A. Bucher." The Supreme Court said in passing upon this receipt, Bucher

having been prosecuted as a warehouseman for appropriating the corn:

> "We must have regard to whom and to what the Act is intended to refer, and to nothing else. It expressly indicates 'warehousemen, wharfingers and other persons,' and by 'other persons' we must of course understand those who are engaged in a like business, or who may connect the business of warehouseman or wharfinger with some other pursuit, such as shipping, grinding or manufacturing. So the goods stored or deposited must be so stored or deposited, with the intention that they shall be returned without change or substitution, or in a manufactured state, to the owner or his transferee."

It is submitted that there is nothing in this statement which conflicts with the contention that the distiller may establish a warehouse in connection with his distillery. On the contrary, the court states that one may connect the business of warehouseman or wharfinger with some other pursuit, such as shipping, grinding or manufacturing. This would include a distiller who connected the business of warehouseman with his business as a manufacturer or distiller of whiskey.

In *Bank vs. Jagode*, a wool dealer made a pretense of keeping a warehouse by making a lease to one of his clerks, of a portion of certain premises. The possession, custody and control of the goods in the alleged warehouse as was shown, were at all times not in the clerk,—the alleged warehouseman,—but in the wool dealer, who appropriated the goods in controversy, notwithstanding the fact that the clerk had issued therefor alleged warehouse receipts. The Supreme Court said:

> "On these facts it is perfectly clear that there was no real warehouse at all in the case and that

Turtle was a mere employe or man of straw used by the Keen-Sutterle Company to cover their own operations with their own goods."

In the course of the opinion, in discussing the Act of 1866, Justice Mitchell said:

"Nor does the act define a warehouse or a warehouseman, but uses the latter word in connection with 'wharfinger or other person' (*ejusdem generis, Bucher vs. Com.,* 103 Pa., 528), in its ordinary signification of one who carries on the business of receiving and keeping goods on storage for the owners, for compensation. The act prohibits the issue of a receipt unless the goods shall have been actually received into store or upon the premises of the warehouseman; the issue of any second or duplicate receipt while the first is outstanding, without writing the word duplicate across the face of the second; the delivery of any goods receipted for except on surrender of the receipt; and the sale, encumbrance, etc., by the warehouseman of goods receipted for. These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business, interest and good faith of the warehouseman, and the penal consequences of any breach of duty by him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors."

The case of *Moors vs. Jagode, supra,* arose out of practically the same state of facts, and in an opinion delivered by the same justice, it is said:

> "We had occasion to consider the Act" (the warehouse act of 1866) "in *Bank vs. Jagode,* 186 Pa., 556, and it was there held that the receipt must be one issued by a *bona fide* warehouseman, and the mere holding himself out to the world or general repute is not sufficient if he is not such in fact."

It might be a sufficient answer to say that much of the opinion of the court quoted is mere *dicta,* not necessarily involved in the decision of the question before the court; the case before the court being such a palpable fraud, and the evidence showing so clearly that the clerk was not a warehouseman, as the Court found.

But it is not necessary to rest on this always more or less unstable ground of discrimination, though it is important in considering the language of a court, to determine whether it is a decision of a specific question submitted, or a mere argument in the opinion. The former is always so much more carefully weighed and balanced than the latter.

It is submitted that what the court meant to convey by the statement: "These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods," was, that the warehouseman, *without maintaining a warehouse for the storage of goods* (the very element wanting in that case), could not issue a warehouse receipt *to himself,* being the owner of the goods stored with himself. This state-

ment of the court can have no application to the case at bar, (a) because here there was a warehouseman engaged in the business of storing for profit; (b) because while the warehouse receipt was issued by the warehouseman to himself, such receipt was at once transferred to the bank and the bank was thereafter the owner of the whiskey. The receipt was the vehicle of transfer; (c) because by the terms of the note the distiller recited "having deposited with the said bank as collateral security 200 bbls. whiskey in bonded warehouse at Womelsdorf, Pa.," which was practically a conveyance of the whiskey to said bank.

A distiller having sold the whiskey to a purchaser, and the purchaser having obtained delivery of the whiskey, could then deliver the whiskey to the warehouse, kept by the distiller, and the warehouse receipt issued therefor would then be perfectly good and valid as a warehouse receipt. If it be said that this illustration involves in the first instance actual delivery to the purchaser, which completed his title, but this was wanting in the case at bar, and such want of delivery, is what makes the sale void under the laws of Pennsylvania, it may be replied: This answer begs the whole question now under discussion, and to which reference will be made later. Surely the Supreme Court of Pennsylvania may be presumed to have been familiar with its own numerous decisions, many of which were cited to it in *Keil vs. Harris,* on the necessity of delivery to complete title, and of its like numerous decisions on the exceptions to such necessity of delivery, and to have had in mind both the rule and the exceptions, when in *Keil vs. Harris,* it decided that the delivery of the warehouse receipts was a good delivery, passing title. The statement in that opinion (to which Judge Archbald

referred as reason for this Court reversing the decision, or rather refusing to follow it): "It is well settled that where personal property is in the hands of a bailee, a transfer by bill of sale alone is good and valid even as against the creditors of the vendor," was only a selection of one of the execptions. There are numerous others. It might have been followed by some general statement of the rule,—as for example, "So, too, where for any other reason actual delivery is impracticable a transfer by bill of sale is good and valid," etc. At any rate the Supreme Court had in mind the necessity for delivery and the exceptions to such necessity when it decided *Keil vs. Harris.* It doubtless treated the joint control of the United States revenue officers and the regulations affecting the warehouse as sufficient to bring that case under the exception. But in any event, until or unless the case is overruled by the Supreme Court of Pennsylvania, it is binding upon the Federal Courts as the correct exposition of the law of this Commonwealth.

In the case of *National Union Bank vs. Shearer,* 225 Pa., 481 (1909), the receipts were held to be warehouse receipts. The tobacco was stored in a building constructed and intended to be used as a cigar factory. While waiting for a tenant the party took on storage a certain quantity of tobacco and issued a number of warehouse receipts for the tobacco. The court held him to be a warehouseman under the Act. Said Mr. Justice Brown:

> "The Act of Sept. 24, 1866, P. L. (1867), 1363, making warehouse receipts negotiable, does not define a warehouseman, and there is nothing in it requiring him to hold himself out to the general public as such. We have defined him to be 'one

who receives and stores goods as a business for a compensation or profit:' *Bucher vs. Com.*, 103 Pa., 528; *Tradesmen's Nat. Bank vs. Jagode*, 186 Pa., 556. There was sufficient evidence for the finding by the jury that the appellant was a warehouseman within our definition of the term as used in the act of 1866, and the learned and careful judge below properly so held in his opinion overruling the motion for a new trial and refusing judgment for the defendant *n. o. v.* On that opinion which clearly and correctly disposes of the questions raised on this appeal I am directed by the court to affirm the judgment."

Applying the tests in every one of these cases, the receipts in controversy here fulfill every requirement of these decisions. First. The distiller had a separate and distinct warehouse (compelled so to have by the Federal Statutes under very strict provisions, prohibitions and penalties). Second. He held himself out to the world as a warehouseman. Third. He stored goods for compensation. The only possible difference between such a warehouse and a public warehouse, was this: This warehouse stored only whiskey, which this distiller had manufactured and sold, and some perhaps which he had not sold, but still owned, instead of storing any kind of goods for anybody. There is nothing in the act and nothing in the decisions which prevents a warehouseman from limiting his business to the storage of any particular kind of merchandise; for example, grain, whiskey, butter, eggs, iron, etc. It is an every-day fact well known, that warehousemen do limit their business to particular branches of trade.

The decisions of the courts of other states on receipts issued by distillers for whiskey kept on storage in

the bonded warehouses confirm the Supreme Court of Pennsylvania. While it is submitted, that even if every other state in the Union had decided otherwise, still this Court is bound by the decision of the State Supreme Court construing the statute of its own state, yet as the soundness of the decision by the Pennsylvania Court has been questioned, it is of interest to note that it is sustained by the courts of other States.

Wherever the question has been raised it has, almost without exception, been decided by the courts of other States that such receipts or certificates were warehouse receipts.

In *Newcomb, etc., vs. Cabell,* 73 Kentucky, 460 (1874), a distiller sold whiskey stored in his warehouse, and delivered to the purchaser a certificate signed by himself as proprietor of the warehouse. Creditors of the distiller attached the whiskey in the warehouse before it was transported and after it was paid for. It was held that the whiskey was sufficiently identified and the sale was absolute, passing the title to the purchaser by the symbolical delivery of the warehouse receipt.

It was said by Judge Pryor:

"The possession of the whiskey having been delivered at the time of the sale, and before the actions by the appellees were instituted, the question of constructive fraud does not arise. The right of property had passed, and also the possession. It is true that the whiskey was not taken hold of by the appellants or removed from the warehouse at the time of the sale, for the reason that the manual possession was not with the vendor. * * * It would be carrying the doctrine of constructive

fraud to such an extent as would virtually prohibit all such sales to hold the manual possession of the property in a case like this is necessary to avoid the effect of a doctrine that, in the language of Chief Justice Robertson, 'is generally felt and admitted to be scarcely less consistent with sound policy than the harmony of legal science.' *Daniel vs. Morrison*, 6 Dana, 185.

The actual possession of the whiskey was really with the storekeeper as the agent of the Government, and the actual possession being in another than the real owner, the doctrine of constructive fraud does not apply. The party holding the property becomes, by reason of the sale the bailee of the vendee: (*Robbins vs. Oldham*, 1 Duvall, 29); *Butt vs. Caldwell*, 4 Bibb., 458."

In *Kessler vs. Veio*, 142 Mich., 471 (1905), defendants, retail liquor dealers, wrote offering to buy ten barrels of whiskey. Plaintiff accepted by letter; then segregated the ten barrels in their bonded warehouse, issued warehouse receipts and an invoice therefor, which were sent to defendants with two of the barrels of whiskey. The other eight barrels remained in the warehouse. The whiskey was supposed to be a certain proof. Dispute arose over the proof of this whiskey and defendants refused to pay, except for the two barrels that they had received and used. It was held:

"The delivery of the warehouse receipts was a sufficient delivery to pass title. Actual delivery is not essential to transfer title to property sold. *Rail vs. Lumber Co.*, 47 Minn., 422; *People vs. Sheehan*, 118 Mich., 539. * * * Where the agreement is on the part of one to sell and the other to buy a specified article, 'the title passes to the

purchaser at once, unless the terms of the contract indicate the intention to have been otherwise, and delivery is not essential to the passing of title as between the parties and their privies.' *People vs. Sheehan, supra.* * * * The letter and documents accompanying it were a notice to the defendants that the property had been set aside and designated as their property, and subject to their control. They could have sold and transferred the warehouse receipts, and thereby conveyed a valid title to the property therein described. *Bank of Detroit vs. Hibbard,* 48 Mich., 123; *First Nat. Bank of Green Bay vs. Dearborn,* 115 Mass., 219; *Sec. Nat. Bank of Toledo vs. Wallbridge,* 19 Ohio St., 419; 30 *Amer. and Eng. Enc. Law* (2d ed.), 71."

This case was followed by the same court in:

Kessler vs. Zacharias, 145 Mich., 698 (1906);
Kessler vs. Lackey, 146 Mich., 384 (1906).

See also the following cases involving warehouse receipts for whiskey, which have been decided in states other than Pennsylvania:

State Bank vs. Waterhouse, 70 Conn., 76 (1897).

Greenbaum Bros. & Co. vs. Megibben, 73 Ky., 419 (1874).

Anheuser-Busch Brewing Assn. vs. Daviess County Distilling Co., 49 S. W. Rep. (Ky.), 541 (1899).

Cochran & Fulton vs. Ripy, Hardie & Co., 13 W. P. D. Bush (Ky.), 495 (1877).

Young vs. Lambert, L. R., 3 Priv. Council App., 142 (1870).

United States vs. 36 Barrels of High Wines, 7 Blatch. Cir. Ct. Rep., 459 (1870).
United States vs. Witten, 143 U. S., 76 (1891).
Conrad vs. Fisher, 37 Mo. App., 352 (1889).

In speaking of the latter case Judge Archbald said:

"And in *Conrad vs. Fisher,* 37 Mo. App., 352, where, as here, a distiller, in the attempt to create a pledge, issued receipts against whiskey in bond in his own warehouse, that the receipts were not good."

An examination of this case will show that it was decided under a statute of the State of Missouri relating to chattel mortgages requiring actual delivery or recording. The syllabus of the case was prepared by Judge Thompson, who delivered the opinion of the court, and in paragraph 7 thereof, he says:

"The owner of goods stored in his own warehouse cannot make a valid pledge of them, by issuing to another an instrument in the form of a warehouse receipt, in which he professes to hold the goods for that other. Such an attempt to create a pledge is void, as being contrary to the provisions of our statute relating to chattel mortgages, which requires a delivery of possession or a recording in the office of the recorder of deeds. (R. S. 1879, sec. 2503.)"

And this same case holds, in paragraph 5 of the syllabus, that:

"Where, from its situation, personal property is not susceptible of actual delivery, manual delivery is not essential to the creation of a pledge;

it may be created by a symbolical delivery,—as by the delivery of a bill of parcels and a warehouse receipt."

This case was originally argued before Buffington and Lanning, Circuit Judges, and Archbald, District Judge, Judge Archbald writing the opinion, Judge Lanning concurring in a separate opinion, Judge Buffington writing a dissenting opinion. This decision reversed Judge McPherson of the District Court of the Eastern District of Pennsylvania. (176 Fed., 606.) In *Boarts, Trustee, vs. Selden & Co.*, Orr, District Judge, Western District of Pennsylvania, decided the case in the Court below, coming to the same conclusion on the Pennsylvania law as did Judges Buffington and McPherson. On the reargument Judge Lanning concurred with Judges Gray and Buffington. We therefore have no Pennsylvania judge except Judge Archbald who has held that the delivery by these receipts was not a good delivery.

If the foregoing proposition,—to wit: the Supreme Court and the subordinate courts of the State of Pennsylvania have construed the Act of 1866, as applicable to the warehouse receipts in controversy here—be true, then under the authority of the Supreme Court of the United States, this court is bound by that construction, and must follow the same.

VI.

THE INTERPRETATIONS OF A STATUTE OF THE STATE OF PENNSYLVANIA BY THE HIGHEST COURTS OF THAT STATE ARE BINDING UPON THIS COURT AND ARE ACCEPTED BY ALL FEDERAL COURTS AS CONCLUSIVE AS TO THE MEANING OF THE STATUTE, EVEN IF, HAD IT BEEN A CASE OF FIRST IMPRESSION, THE FEDERAL COURT MIGHT HAVE DIFFERENTLY CONCLUDED.

It is well established that the construction of a state statute by the highest court of the state is accepted by the federal courts, as conclusive as to the meaning of the statute. This has been decided by the Supreme Court of the United States in a number of cases.

In *Mo., Kan. & Tex. Ry. Co. vs. McCann,* 174 U. S., 580, 586 (1898) it was said:

> "But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof."

And again, in *Noble vs. Mitchell,* 164 U. S., 367, 372, (1896):

> "Manifestly the interpretation of a statute of the State of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us."

In the case of *New York, Lake Erie & Western Railroad Company vs. Pennsylvania*, 158 U. S., 431, (1894), the court had occasion to consider a Pennsylvania statute imposing a tax upon tolls. The Supreme Court of Pennsylvania had defined the word "tolls" as used in the tax laws of that State. The court (commencing at the foot of page 435), said:

> "A construction or meaning attributed to the terms of a state statute by the courts of such state will, of course, be adopted by this court when called upon to decide questions arising under such legislation."

In *Branch of State Bank of Ohio vs. Knopp*, 16 Howard, 375, 391, (1853) the court said:

> "The established construction of a statute of the state is received as a part of the statute."

In *Whitman vs. Atkinson*, 130 Fed. Rep., 759, 761, decided April 26, 1904, the Circuit Court of Appeals for the Second Circuit, construing a Kansas statute, said:

> "The interpretation becomes a part of the law of that state, as much so as if incorporated into the body by the legislature. *Christy vs. Pridgeon*, 4 Wall., 196."

Adopting these principles, this Court said of a decision by the Supreme Court of Pennsylvania in *Zeiger vs. Pennsylvania Railroad Co.*, 158 Fed. Rep., page 809, (1908) in a case argued before Dallas, Gray and Buffington, Circuit Judges—opinion by Judge Dallas:

> "It put a construction upon the statute, and we are 'no more at liberty to depart from that construction than to depart from the words of the

statute.' * * * The construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States: *Elmendorf vs. Taylor*, 23 U. S., 158; 6 L. Ed., 289."

It is submitted, therefore, that under the principles established by these cases, this court is bound by and must follow the construction placed by the Supreme Court and followed without exception by the subordinate courts, of the State of Pennsylvania, upon the Act of 1866, and hold that the receipts in controversy here are warehouse receipts under said act.

The trade and the public have relied upon these decisions. Great quantities of whiskey have been bought and sold or pledged in reliance thereon. Millions of money is today invested in whiskey or loaned on the security thereof, the only evidence of title being warehouse receipts of the character of those involved in this case.

In conclusion, it is respectfully submitted:

1st. That the courts of Pennsylvania have decided that certificates for whiskey of the form and character in controversy, issued by distillers from their bonded warehouses, are warehouse receipts under the Act of 1866, and that this court and all Federal courts are bound to follow that interpretation of its own statute by the courts of this state.

2nd. That the law of Pennsylvania requiring actual delivery of personal property when sold or pledged,

does not require such delivery under any and every condition, but has well-established and recognized exceptions, applicable to the facts of this case. The purpose of the transaction was manifestly fair and honest, and the end to be accomplished by the pledge was promoted by the retention of possession by the pledgor. The goods were in process of manufacture, and therefore of necessity it was impractical to deliver the same. The whole transaction was in accordance with the usages and customs of the trade; the transferring of actual possession being impossible, without great shrinkage in value, loss of valuable rights and guarantees, and incurring payments of taxes, interest and other charges. The goods on storage were, for the time being, actually in the physical possession and exclusive control of others than the pledgor. The presumption of constructive fraud on account of these facts is clearly and conclusively rebutted, and constructive delivery such as was made by the deposit of these certificates was legal and effective under the law of Pennsylvania.

This rule in Pennsylvania, that a vendor's retained possession unexplained, is a constructive fraud, would not declare this transaction fraudulent, under the facts here shown. The rule, if it so declared, would be unreasonable, unbending and unjust, a mere artificial device more productive than preventive of fraud.

As was said by Judge Dean:

"But, in the long line of cases following it, step by step, the rule has been so softened, that now it may be said, with few exceptions, where the purpose of the contracting parties was, as between themselves, an honest one, and there was no concealment as to creditors of its true nature, the con-

tract is not constructively fraudulent; in other words, the law will be slow to hold the parties scamps, constructively, if the contract in view of its purpose, was actually an honest one."

The great inconvenience and enormous loss to the trade by overturning its long-established usage and custom, ought not to be inflicted unless the law authoritatively, imperatively and incontrovertibly so commands.

Respectfully submitted,

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APPENDIX.

Pattison vs. Dale et al., 196 Fed. Rep., 5—115 C. C A., 115. (Circuit Court of Appeals, Sixth Circuit, April 11, 1912). No. 2172:

"1. Internal Revenue (Sec. 24)—Distillery Warehouse—Stored Liquors—Rights of Owners.

Where distilled liquor is stored in a distillery warehouse under control of the collector of the district and in charge of the internal revenue storekeeper as provided by U. S. Comp. St., 1901, pp. 2122-2124, Secs. 3271-3274, *et seq.*, providing for a joint custody of the warehouse by the distiller and the storekeeper, the distiller's surrender of control does not divest his title nor prevent his dealing with the property subject to the paramount rights of the government."

"2. Warehousemen (Sec. 15)—Pledges—Whiskey in Distillery Warehouses.

U. S. Comp. St., 1901, p. 2130, provides that, as spirits are received in a distillery warehouse, the gauger or storekeeper must place on the head of each barrel an engraved stamp signed by the collector or storekeeper and gauger, showing number of proof gallons, name of distiller, date of receipt in the warehouse, and serial numbers of barrels in progressive order, and that no two or more casks or packages warehoused in the same distillery shall be marked with the same number. Held, that where, after spirits had been deposited in a distillery warehouse and properly marked as provided, the distiller pledged a certain number of barrels specifically designated by number, by issuing warehouse receipts, to the pledgee therefor, describing particular barrels by number, number of wine gallons, the date when made, and the number of ware-

house stamp, etc., and thereafter became a bankrupt, he thereby effectively created an equitable lien in favor of the pledgee, the validity of which neither he nor his trustee could be heard to deny."

Pattison vs. Dale, 196 Fed. Rep., 5, 115 C. C. A., 115 (Cir. Ct. of Appeals, 6th Circ., 1912). Warrington, C. J.:

"The legal effect of the warehouse documents must be tested by the government's custody and control of the warehouses and whiskey, and the necessity of the situation so created.

[1] As to the warehouses: The distiller is bound to provide a warehouse on his distillery premises for the storage of distilled spirits of his own manufacture until the tax is paid. When approved and reported on by prescribed federal officers, it becomes a 'bonded warehouse of the United States, to be known as a distillery warehouse' and is placed 'under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper * * *' (*U. S. Comp. Stat.*, 1901, p. 2122, Sec. 3271), and 'in the joint custody of the storekeeper and the proprietor thereof,' but must be kept securely locked and not opened except 'in the presence of such storekeeper;' and no articles shall be received in or removed from such warehouse 'except on an order or permit addressed to the storekeeper and signed by the collector' (page 2124, Sec. 3274). As the spirits are received in the warehouse, the gauger or storekeeper must place upon the head of each barrel an engraved stamp signed by the collector, or storekeeper, and gauger, showing number of proof gallons, name of distiller, date o receipt in

warehouse, and serial numbers of barrels in progressive order, and 'no two or more casks or packages warehoused at the same distillery shall be marked with the same number,' (page 2130, Sec. 3287); the distiller is required within five days after the first of each month to enter the spirits for deposit, and give bond for payment of the tax before removal (page 2133, Sec. 3293); the tax must be paid by the distiller 'within eight years from the date of the original entry for deposit' (page 2110, Sec. 3251). Spirits may on payment of the tax be withdrawn from the warehouse on application to the collector (page 2135, Sec. 3294); the gauger must on receiving the collector's order gauge the spirits in the presence of the storekeeper before removal (pages 2133-2135, Secs. 3294, 3295); removal of spirits on which the tax has not been paid is forbidden under severe penalties of fine and imprisonment (page 2136, Sec. 3296).

According to the dates of the warehouse documents, the whiskey in question was made in February, March, and April, 1906, and presumably was stored in those months; it might remain there until the corresponding months of 1914.

Examination of these statutory provisions will show them to be very comprehensive. The government requires distillers to furnish distillery warehouses of the kind in question, subject to approval of the Commissioner of Internal Revenue. It has placed them under the direction and control of collectors and in immediate charge of storekeepers with the keys. It has through severe penalties guarded against removal of whiskey until the tax is paid. While these means of control and protection do not divest the distiller of title to

either warehouse or whiskey, it is plain that during the time of storage he is made to surrender the dominion and control of an owner. This is none the less true because the 'duty which the revenue officers owe in regard to the security of the warehouse and the safe-keeping of the spirits therein' is to the government. *United States vs. Witten,* 143 U. S., 76, 79, 12 Sup. Ct., 372, 373, 36 L. Ed., 81. Nor is such surrender of dominion and control affected by the joint custody of the warehouse that is given to the storekeeper and proprietor. His property is so exclusively held and dominated by the government, that not even his creditors can seize it through attachment or other process. *McCullough, Jr., vs. Large* (C. C.) 20 Fed., 309, 312; *Conrad vs. Pacific Ins. Co.,* 31 U. S., 262, 280, 8 L. Ed. 392. It is not a sufficient answer to say, as is earnestly contended by one of learned counsel, that the distiller avails himself of his 'right of ownership, possession, or control to inspect and repair the cooperage and to regulate temperature in the warehouse,' because he cannot enter or do these things except in presence of the storekeeper. The distiller cannot remove the spirits except on application to the collector and payment of the excise tax. And, aside from removal to other places of storage under formalities and bond (which practically preserve the government's power and control), there is no apparent object of removal during the aging process. The manifest purpose of allowing the spirits to be stored eight years is to enable the distiller to postpone payment of the tax until the spirits ripen into whiskey and so become fit for market. The cost of producing whiskey obviously requires either

the possession of capital, or the means of obtaining it, during this waiting period. Just how much time is so required does not appear, but it is common knowledge that several years must elapse before the spirits can be marketed to the best advantage of the distiller.

[2] As to pledge: We thus reach the controlling question whether this inevitable situation so far removes the product from the control of the distiller as to enable him to pledge or otherwise charge his interest in it. To state the question more specifically: Can it be rightly predicated of this situation that the change of physical possession and control which takes place between the distiller and the government furnishes a basis for the distiller, through constructive delivery made in virtue of the title remaining in him, either to effect the change of possession requisite to a pledge or to create its substantial equivalent by equitable lien? It is a familiar doctrine that possession is of the essence of a pledge, but that such possession may be constructive instead of actual. Any consideration of the subject must take into account the nature of the thing designed to be pledged. If it be capable of manual delivery, the means of effecting a change of possession are simple; if not, resort is had to constructive delivery. Constructive delivery is controlled by the necessity of the case. The object is to put the pledge under the power and control of the pledgee. Are the custody and control of the government an adequate substitute?

In *Casey vs. Cavaroc*, 96 U. S., 467, 477 (24 L. Ed., 779), it was held that placing with its president bills and notes belonging to a bank for

deposit with a firm (of which the president was a member) in pledge to secure a loan made to the bank (and the president turned the securities over to an employee of the bank and they were in fact used by the bank) was not such a change of possession as was necessary to create a privilege by the law of Louisiana; Justice Bradley saying:

'The difference ordinarily recognized between a mortgage and a pledge is that title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge. * * * The possession need not be actual; it may be constructive, as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security—that of mortgage and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.'

The cases of *Union Trust Co. vs. Wilson,* 198 U. S. 530, 25 Sup. Ct. 766, 49 L. Ed., 1154, and *Security Warehousing Co. vs. Hand,* 206 U. S., 415, 27 Sup. Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas. 789, furnish illustrations of what conditions will, and what will not, be regarded as sufficient to exclude

the owner from control of goods capable of delivery, which he owns and desires to pledge. In both cases, the place of storage was part of the structure of the pledgor. In the first case, the facts justified the conclusion that a change of possession was wrought; but the facts of the second case induced the court to characterize the scheme as a 'mere pretense, a sham.' This court in *Re Cincinnati Iron Store Co.*, 167 Fed., 486, 492, 93 C. C. A., 122, 128, held that the fact that pledged iron was stored with distinct marks to identify it on the premises of the pledgor, and placed in the custody of one of its employes, did not invalidate the pledge, 'provided the possession was actually changed from the pledgor to the pledgee, and the pledgor's dominion over the property otherwise removed.' Again, in *Hurley vs. Atchison, Topeka & Sante Fe Ry.*, 213 U. S., 126, 134, 29 Sup. Ct. 466, 469 (53 L. Ed., 729), where a mining company had contracted to mine and deliver coal sufficient to meet the current needs of the railroad company, but through financial embarrassment was unable to do so, and in order to enable the mining company to keep its agreement the railroad company furnished the mining company with money in advance of the agreed times of payment, it was held that this implied 'a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement.'

The decisions mentioned are amply illustrative of the general law respecting the necessity of change of possession to sustain a pledge, where the pledgor's custody and control admit of such change. It is manifest, however, that there are marked dif-

ferences between the facts of those cases, also of their class, and the facts of the instant case. True, the government is not a bailee of the whiskey, in the sense that it has issued or would issue warehouse receipts to the distiller. Nor is it responsible to the distiller's pledgee as agent or otherwise. But there is a union of interests in the government and the distiller that is important. The distiller, as stated, requires time both to age his whiskey and pay the excise tax. The government exacts custody and control of the spirits as a condition of granting the time. The duration of these conditions—this isolation and environment—extends into years. It results that the whiskey product becomes an object of recognized value. Is there no lawful way to utilize this value as security?

The present warehouse documents were executed and issued by the distiller. They each apparently bear the signature of a United States gauger, indicating that he gauged the whiskey described in the receipts; but there is nothing in the record to show that the original receipts in fact bear his signature. If the gauger did sign them, such act could only amount to an individual statement of the presence of the whiskey; it would not bind the government. But it is admitted that Rohrer manufactured the whiskey and stored it in the warehouse, and we need not consider that feature of the case. There is much controversy, however, touching possession of the whiskey; Pattison claiming that it is in the government, and the trustees that it was in the distiller and is now in them. This results in contention on the part of the trustees that the distiller was nothing more than

his own warehouseman respecting his own warehouse receipts. The argument assumes the question. It treats Rohrer's relations to the warehouse and whiskey precisely as if his custody and control were absolute and exclusive. It will not do to say either that he was in actual possession, or that he could (without paying the tax and losing the opportunity given to age the spirits) effect a physical change of possession. *Union Trust Co. vs. Wilson, supra,* 198 U. S., 537, 25 Sup. Ct., 766, 49 L. Ed., 1154. The most that he could do was, in virtue of his title, to give constructive possession through symbolic delivery; and then only subject to the rights of the government. And this seems to be just what he attempted to do; for the receipts were given in 'conformity' with the laws of the United States, and each contains an argeement that the pledgee shall supply the money to pay the excise tax.

It is urged that the distiller's power through payment of the tax to defeat the attempted pledge reduces the transaction to one of personal obligation alone of the distiller, and in effect destroys the security altogether. Illustration of this is said to be furnished by the fact, admitted in this case, that 590 barrels of the 800 attempted to be pledged were sold and removed from the warehouse by Rohrer without the knowledge of Pattison. Serious as this is, it does not seem to be decisive. It must be conceded that it tends to limit the desirability and value of the whiskey as security. But this does not prove that there was no pledgeable interest in the whiskey. One test of this may be seen in the apparent right of the pledgee, through seasonable and proper judicial proceedings, to pre-

vent the distiller from exercising his right of withdrawal upon showing his purpose to convert the pledge. It would hardly be claimed that because an agent acting as custodian of a pledge, or because a regular warehouseman, had wrongfully surrendered or otherwise disposed of the pledge to the damage of the pledgee, his fraud would operate to overthrow the settled law sanctioning pledges so made. Nor is the claim tenable that the whiskey gave credit to the distiller, and the pledge operated to defraud his general creditors. The whiskey was not visible. The public had no access to the warehouses. *Taney vs. Penn Nat. Bank,* 187 Fed., 703, 109, C. C. A., 437 (C. C. A. 3rd Cir.); *Union Trust Co. vs. Wilson, supra,* 198 U. S., 538, 25 Sup. Ct., 766, 49 L. Ed., 1154. It is said all trouble could have been avoided by storing in general bonded warehouses. This may be assumed; but it would apply to all distillers, and yet it is not shown that such warehouses are at all adequate. Their selection is within the discretion of the Commissioner of Internal Revenue, and but few of such warehouses seem to have been provided. The possibility, however, of obtaining greater safety and better security, does not answer the question whether whiskey in distillery warehouses is susceptible of valid pledge.

The present transactions took place in Ohio. There is no statute of the state that appears to affect the present question. In *Thorne vs. Bank,* 37 Ohio St., 254, it was held in respect of hams in the exclusive custody and control of the owners, which apparently could have been changed to the creditor, that (syllabus):

'An instrument in the form of a warehouse receipt executed by a debtor to his creditor, on property owned by the debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor.'

The case of *Hunt vs. Bode, Assignee,* 66 Ohio St., 255, 64 N. E., 126, presents facts different from those in *Thorne vs. Bank* and recognizes the principle that the delivery must be such as the nature of the case admits. The owner of warehouse receipts representing whiskey stored with a warehouseman, delivered them in pledge to a bank, and while the bank was in possession of the receipts the owner pledged his equity in them to another, gave notice of his action to the bank, and it accepted. In the first paragraph of the syllabus it is stated:

'A written pledge or transfer of an interest in warehouse receipts, or choses in action to secure a debt is valid, without actual or manual delivery, where such receipts or choses in action are being held by another creditor on pledge as collateral security for a loan of money made by him to the same pledgor, or transferror, the second pledge or transfer being equivalent to actual delivery of the property pledged or transferred; and a request by the pledgor or transferror to his first pledgee, that when his debt is paid he deliver the collateral to his other creditor, constitutes sufficient possession of the collateral by such other creditor.'

The pledgee of the equity never had actual possession of either the warehouse receipts or the whiskey

represented by them, and yet the transaction was treated as constituting 'sufficient possession of the collateral by such other creditor.' This result was reached, as pointed out in the opinion, through the intent of the holder of the equity to deliver possession so far as the nature of the situation would permit. Thus it was said (page 269 of 66 Ohio St., page 128 of 64 N. E.):

> 'It is the application of the familiar rule that the transfer is complete and delivery made, when the owner has done all that he can do in the premises, and has given such possession to the pledgee or transferee as the nature of the property and its situation will permit. * * * This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law.'

The principle so recognized is settled; indeed, it is the basis of smybolic delivery. We may add some illustrations to those mentioned earlier herein, ending with that found in *Hurley vs. Atchison Topeka & Santa Fe Ry., supra,* which related to unmined coal. See 2 *Kent's Com.,* (13th Ed.), pp. 500, 501; *Ex parte Fitz,* 9 Fed., Cas., 185, involving locomotive engines; *McComber vs. Parker,* 14 Pick. (Mass.), 497, 505, concerned a pledge of bricks as they were made and held in a brickyard; *Bank vs. Harkness,* 42 W. Va., 156, 167, 24 S. E., 548, 32 L. R. A., 408, had relation to 1800 barrels of oil in a tank. *Nevan vs. Roup,* 8 Iowa, 207, 211, a pledge of oats contained in rail pens on the lands on which the grain was grown and threshed; *Jewett vs. Warren,* 12 Mass, 300, 301, 7 Am. Dec., 74, a pledge of logs within a boom.

There is also to be added the weight and effect of the custom respecting the pledge of whiskey deposited

in distillery warehouses. The averments in this behalf are set out in the answer and cross-petition and of course so far as well pleaded are admitted by the demurrer. They are to the effect that these transactions were had in accordance with a custom of trade of more than 40 years' standing, extending throughout the country; that under the custom, distillers, bankers, brokers and dealers in whiskey have during that time treated warehouse documents like these as giving constructive possession of the barrels of whiskey and as conveying an interest in the whiskey according to the nature of the transaction; and that the receipts have been treated as transferring, through indorsement, the rights of the original holders of the whiskey described in them. We cannot under the pleadings accept the suggestion that this custom rests on, or is affected by a statute of the state of Kentucky. In *Gibson vs. Stevens*, 49 U. S., 384, 388 (12 L. Ed., 1123), Chief Justice Taney, when speaking of instruments which were regarded by the court as transferring the legal title and constructive possession of certain flour and pork held in warehouses in Indiana, said of the course of trade:

> 'It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any decision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it. * * *'

Furthermore, we must test the intent and effect of these warehouse documents as we should if the suit were between Rohrer and Pattison. As Judge Knappen said in *Re Cincinnati Iron Store Company, supra,* (167 Fed., 492, 93 C. C. A., 128):

> 'A change of possession to the extent of furnishing notice to third persons becomes immaterial, as no rights of such persons have intervened.'

It is to be observed, too, that in *Hunt vs. Bode* the controversy was between the pledgee and the assignee in insolvency of the pledgor; and although a creditor of the assignor prosecuted the case to the Supreme Court, he failed. And in *Hurley vs. Atchison, Topeka & Sante Fe Ry. Co., supra,* it was held (page 134 of 213 U. S., page 469 of 29 Sup. Ct., 53 L. Ed., 729):

> 'The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings.'

See, also, *Wilson vs. Leslie,* 20 Ohio, 161, 166; *York Mfg. Co. vs. Cassell,* 201 U. S., 344, 351, 20 Sup. Ct. 481, 50 L. Ed., 782; *Security Warehousing Co. vs. Hand, supra,* 206 U. S., 424, 425, 27 Sup. Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas., 789; *Zartman vs. First National Bank,* 216 U. S., 134, 138, 30 Sup. Ct., 368, 54 L. Ed., 418.

We are constrained to hold that, as between Rohrer and Pattison, the effect of the delivery of the warehouse documents was to invest Pattison with constructive possession of the barrels of whiskey described in the receipts. The warehouse documents contain the substantial elements of well-understood warehouse receipts,

and no question is made as to their form. It is clear that Rohrer intended to deliver, and Pattison understood that he was to acquire constructive possession of the barrels of whiskey. This mutual purpose ought to be carried out if it can be. According to the present record, the transactions were entered into in good faith to secure loans of money then made. The descriptions of the warehouses by their numbers and of the barrels containing the whiskey dealt with are specific and furnish accurate means of identification. The barrels bear serial numbers, and we have seen that the act provides that:

> 'No two or more casks or packages, warehoused at the same distillery, shall be marked with the same number.'

We conclude on this record that the action of Rohrer was an appropriation of these barrels of whiskey to the purpose of securing Pattison and Pattison alone in respect of moneys then advanced by him. It results that if we are in error in our belief that constructive possession was given, at least an equitable lien on the whiskey was created. As the present learned Chief Justice, when speaking of certain municipal bonds, said in *Walker vs. Brown*, 165 U. S., 654, 666, 17 Sup. Ct., 453, 457 (41 L. Ed., 865):

> 'To dedicate property to a particular purpose, to provide that a specific creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.'

See, also, *Fourth Street Bank vs. Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855; *Gardner vs. National City Bank*, 39 Ohio St., 600, 604; *Hurley vs.*

Atchison, Topeka & Santa Fe Ry., supra, 213 U. S., 134, 29 Sup. Ct., 466, 53 L. Ed., 729; *Bank vs. Day,* 150 Iowa, 696, 699, 700, 130 N. W., 800.

It must be remembered that we are concerned here with only the 210 barrels of whiskey remaining in the distillery. As between Rohrer and Pattison, could Rohrer be heard to say that he did not pledge this whiskey, or at least that he did not create an equitable lien upon it? We think not. We have seen that the trustees stand no better than the bankrupt.

Furthermore, instruments similar to those now in issue have been recently upheld in well considered decisions. In *Taney vs. Penn Nat. Bank,* 187, Fed., 689, 702, 109 C. C. A., 437, 450 (C. C. A. 3rd Circ.), Judge Gray cogently discussed the question of the sale of whiskey stored in distillery warehouses. A pledge was also involved and both court and counsel treated the subject of sale as embracing all material questions of pledge. We have purposely refrained from discussing sales. The question does not arise; and we are told in the argument that such an issue is to be presented to the court later. In the course of his opinion Judge Gray said:

> 'The relation between the distiller and the officers of the government in custody of his whiskey is *sui generis.* It is prescribed by law and is not contractual. But a situation is thereby created, as above described, which in our opinion brings both of the cases before us within what we think is the well-settled rule of law in Pennsylvania, permitting under certain circumstances a valid sale of personal property, as against creditors, to be made in the absence of physical delivery of the property sold.'

The case below is reported under the name *In re Miller Pure Rye Distilling Co.* (D. C.), 176 Fed., 606. Judge McPherson there reached the same conclusion.

Merchants' National Bank of Baltimore vs. Roxbury Distilling Company, 196 Fed., 76, was brought in the Circuit Court of the United States for the District of Maryland, and decided by Mr. John Hinkley, Special Master. Distillery warehouse receipts given in pledge were sustained. A statute of Maryland provides that all warehouse receipts issued by a United States distillery warehouse shall be governed by and be subject to the state act as fully as are the warehouse receipts of any warehouseman. Irrespective of the statute, the master said:

> 'It seems clear to me that there is adequate reason for recognizing the validity of distillery warehouse receipts which has been given to them by long course of dealing by the traders and the banks, and that this contention should prevail. It is a growth and development of the doctrine of constructive or symbolical delivery which I have attempted to trace in this opinion, and of the underlying principle that the courts will recognize as constructive delivery that form of delivery which the character and situation of the goods imperatively requires.'

He reached the conclusion that the receipts 'are valid not only inter parties or against solvent distillers, but absolutely as vesting title in such purchasers or liens in favor of such pledgees, against subsequent creditors.' His report was on March 25, 1912, sustained by Judge Morris, who said:

> 'But independent of the special enactment of Maryland with regard to distillery warehouses, I

am in full accord with the special master in his conclusion that because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commerically possible under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States. * * *

It appears that this constructive delivery is commonly made use of by those dealing in whiskey, and money is loaned on pledges of the certificates by banks and others in sums of great magnitude. This is so because whiskey usually must be kept in the distillery warehouse five years to mature, and in no other way could the necessary money be raised and the whiskey itself be commercially dealt with except by the use of these warehouse certificates representing the whiskey.'

The order and decree below must be reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion."

TANEY, TRUSTEE OF MILLER PURE RYE DISTILLING COMPANY, *v.* PENN NATIONAL BANK OF READING.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 115. Argued December 9, 10, 1913.—Decided January 26, 1914.

In determining the relative rights of the trustee in bankruptcy and a secured creditor the legal effect of the transaction securing the loan depends upon the local law.

The rule that physical retention by the vendor of goods capable of delivery to the vendee is a fraud *per se* does not apply in Pennsylvania in a transaction, the inherent nature of which necessarily precludes delivery, or in which the absence of a physical delivery is excused by the applicable usages of trade.

Under the revenue laws of the United States the Government, although not strictly a bailee, is in complete control of a distillery warehouse which is in effect a bonded warehouse of the United States.

A distiller is not debarred from passing title or creating a special interest by way of pledge in whiskey deposited in his distillery warehouse in conformity with the revenue laws of the United States.

This court will not condemn honest transactions growing out of the recognised necessities of a lawful business; and so *held*, that the established practice of the distillery business to issue warehouse receipts for whiskey deposited in the distillery warehouse and pledge such receipts as security for loans is not one opposed to public policy.

In Pennsylvania, certificates issued by the owner of a distillery on whiskey in the distillery warehouse represent the property, and the delivery thereof as security for a loan made in good faith and in accordance with the usages of the trade amounts to actual delivery of the property itself.

187 Fed. Rep. 689, affirmed.

THE facts, which involve the relative rights of the trustee in bankruptcy, and the holder as security for loans of warehouse receipts for whiskey in a distilling warehouse issued by the distiller, are stated in the opinion.

Mr. Joseph Hill Brinton for appellant:

The company retained physical possession and control of the whiskey and received for its own use the charges for storage, except in so far as the Government's interest is concerned in the protection of its taxes.

The whiskey ordinarily could not be subject to the pledge in the absence of an actual or constructive delivery. Nothing appeared on the books of the company, and no other step was taken or attempted to negative the apparent ownership of the bankrupt company in whose possession and under whose control the whiskey was when the trustee took charge.

Where the pledge is left in the possession of the debtor, the burden of proof that there was a constructive delivery is upon the creditor claimant. *Barr* v. *Reitz*, 53 Pa. St. 256; *Hunter Construction Co.* v. *Lyons*, 233 Pa. St. 561.

Pennsylvania has adopted the English rule that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent.

Appearances must agree with the real state of things, and the real state of things must be honest and consistent with public policy, affording no unnecessary facility for deception. *Clow* v. *Woods*, 5 S. & R. (Pa.) 277.

Where possession has been withheld pursuant to the terms of the agreement some good reason for the arrangement besides the convenience of the parties should appear, since public policy requires change of possession.

Where the subject of the sale or pledge is in the possession of a third party as bailee, constructive delivery is sufficient.

The law of Pennsylvania controls, and the courts of that State have universally held that a man may not be his own warehouseman. *Bank* v. *Jagode*, 186 Pa. St. 556; *Moors* v. *Jagode*, 195 Pa. 163; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415; *In re Millbourne Mills Co.*, 172 Fed. Rep. 177.

Appellant contends that:

Either actual delivery by payment of tax and release of the whiskey for that purpose, or constructive delivery by removal to a general bonded warehouse and delivery of its warehouse receipt, was practicable, but neither means was adopted.

No constructive or symbolical delivery could be or was made by the so-called warehouse receipt given to the appellee.

The alleged custom of the trade, being contrary to public policy, cannot be sustained.

Individual interests arising from such a custom must suffer the consequences when the courts hold that they exist contrary to public policy. *Collins' Appeal*, 107 Pa. St. 590.

The convenience of the parties is not of moment. *Jenkins* v. *Eichelberger*, 4 Watts (Pa.), 121.

The real test is one of public policy and the question is not what rights as to possession the owner may have exercised, as between himself and the Government, but what opportunity he had of creating secret liens to the prejudice of the innocent and credulous.

A building erected by a distiller on the distillery premises pursuant to the statute has none of the characteristics of a regular warehouse. *Bucher* v. *Commonwealth*, 103 Pa. St. 523; *National Bank* v. *Sherer*, 225 Pa. St. 470.

Should the distiller desire to sell or pledge whiskey the act of August 27, 1894, §§ 51, 52, 28 Stat. 564, affords ample relief.

The court, for reasons of public policy, will not permit a man to be his own warehouseman and pass title by delivery of receipts, and thus afford an opportunity for duplication and fraud. The supervision of the Government lessens the danger of such fraud. Although the District Court held that the Government is a bailee, it is clear that in the one respect essential to prevent fraud, it is in no sense a bailee for it does not issue or control the issue of warehouse receipts and keeps no record of change of ownership.

Generally speaking, the Government cannot be said to be a bailee. It issues no receipts, recognizes no transfer of title or other interest, assumes no responsibility, and is not chargeable with negligence.

The Federal Government exercises the same control over the distillery as it does over the warehouse proper. The Internal Revenue Acts of the United States, Rev. Stat., §§ 3267, 3276, 3287, 3288, 3293, 3292 A, 3301, 3303, provide for the warehouse construction and custody and control thereof by the Government.

In no sense are the goods bailed to the Government, so as to permit constructive delivery to be made. *United States* v. *Thirty-six Barrels*, 7 Blatchf. 459; *Witten* v. *United States*, 143 U. S. 76.

In order that both the Government and the public

might be protected from fraudulent duplication of receipts, the act of 1894 was passed, whereby the distiller could defer the payment of tax and permit his product to ripen, but denied to him the opportunity of preying upon the credulous public. It is therefore in furtherance both of the convenience of the distiller and the protection of the public, that warehouse receipts should be negotiable only where the whiskey is deposited in a public bonded warehouse.

The injury to the liquor traffic dwelt upon by counsel is imaginary rather than real, and is indeed a weak support for a principle of law affording so widespread an opportunity for fraud and deceit. It is urged that the trade would be injured, and therefore the court should countenance a practice running counter to public policy. This injury, if real, could and would be corrected by proper legislation requiring the counter signature of some person in authority, in control of the warehouse, or some other simple provision entirely safeguarding the interests of the public. Such fraud is not possible in Pennsylvania since the passage of the act of May 16, 1901, Pub. Laws p. 194, and as to the law in that State see *Barlow* v. *Fox*, 203 Pa. St. 114; *Miller* v. *Browarsky*, 130 Pa. St. 372; *Rosenbaum* v. *Batjer*, 154 Pa. St. 544; *Sloan* v. *Johnson*, 20 Pa. Super. Ct. 643; *White* v. *Gunn*, 205 Pa. St. 229, citing *Clow* v. *Woods*, 5 S. & R. (Pa.) 575. See also *Conrad* v. *Fisher*, 37 Mo. App. 352; *Union Trust Co.* v. *Trumbull*, 137 Illinois, 146.

As to the law of the Federal courts relative to warehouse receipts, see *United States* v. *Witten*, 143 U. S. 76.

As to the rights of the trustee in bankruptcy in such a case as this, see *Bank* v. *Staake*, 202 U. S. 149; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415.

Mr. Lawrence Maxwell, *Mr. Philip S. Zieber* and *Mr. A. Leo Weil*, with whom *Mr. Thomas Iaeger Snyder* was on the brief, for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

On February 3, 1908, a petition in bankruptcy was filed against the Miller Pure Rye Distilling Company; it was adjudicated a bankrupt on February 19, 1908, and the appellant was appointed trustee. The Penn National Bank of Reading, Pennsylvania, the appellee, intervened in the bankruptcy proceeding with a petition asking for the delivery to it of two hundred barrels of whiskey stored in the bonded warehouse of the distilling company, upon the ground that the property had been lawfully pledged by the company to the bank. The District Court sustained the lien and accordingly held the claimant entitled to the delivery sought (176 Fed. Rep. 606); and, on appeal, this decree was affirmed by the Circuit Court of Appeals (187 Fed. Rep. 689).

The pertinent facts are these: On August 27, 1907, the bank lent to the distilling company $2500 for which the company gave its four months' note reciting the deposit with the bank, as collateral security, of "200 bbls. whiskey in bonded warehouse at Womelsdorf, Pa., as per Warehouse Rects, gauger's ctf. &c. accompanying." The form of the receipts is shown by the following copy of one of them:

"No. 5454. 25 Bbls.

First District of Pennsylvania.

United States Internal Revenue Distillery Bonded Warehouse of Miller Pure Rye Distilling Company.

Ryeland, Berks Co., Pa., August 26th, 1907.

Received on Storage from Ourselves Twenty-five (25) Barrels of Miller Pure Rye Whiskey Distilled, Marked and Numbered as per Record Attached, Subject to our Order and Risk of Loss or Damage by Fire, The Elements, Leakage, Evaporation or Accident, Deliverable only upon Surrender of this Certificate, Payment of Tax and other

Charges due Thereon, and Storage at the Rate of Five Cents per Barrel per month, from August 26th, 1907.

Inspection Spring 1907.

Stored in Warehouse No. 2.

Serial Nos. of Packages 7964/7988.

Miller Pure Rye Distilling Co.,

S. V. NAGLE, President.

Address all Communications to Miller Pure Rye Distilling Company, Philadelphia, Pa.

Special Notice—Particular care should be taken of this Certificate as the whiskey cannot be delivered without its surrender."

These receipts were indorsed by the company, and, with the gauger's certificates, were delivered to the bank. The whiskey itself was not actually delivered and remained in the bonded warehouse. The note not being paid at maturity, the bank upon notice sold the warehouse receipts at public sale on February 5, 1908, and became the purchaser. This sale, however, is not material to the present question which turns upon the validity of the lien.

There is no doubt as to the intention and actual good faith of the parties. The loan was made in reliance upon the designated security and the ground of attack is that the lien failed for want of delivery of possession.

The legal effect of the transaction depends upon the local law. *Thompson* v. *Fairbanks*, 196 U. S. 516; *Humphrey* v. *Tapman*, 198 U. S. 91; *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344; *Hiscock* v. *Varick Bank*, 206 U. S. 28; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 425; *Bryant* v. *Swofford Bros.*, 214 U. S. 279. Reviewing the decisions of the Supreme Court of Pennsylvania with respect to sales—the principles of which were deemed to be applicable—the Circuit Court of Appeals reached the following conclusion: "It suffices to say that the law of

Pennsylvania in respect of the question we are now considering, is settled by a line of cases extending through nearly a century. Starting with the policy of the statute of Elizabeth, for the circumvention of fraud and deceit in sales of personal property (which nowhere in terms refers to retention of possession by a vendor), it has wisely developed the spirit of that statute and evolved the salutary rule, that where there is nothing in the case but the retention of a physical possession by the vendor, which he is capable of delivering to the vendee, such retention is fraud *per se*, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty. But this rule is not applied by the courts of Pennsylvania to cases where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made." 187 Fed. Rep. 689, 696.

We entertain no doubt as to the correctness of this statement (*Clow* v. *Woods*, 5 S. & R. 275; *Barr* v. *Reitz*, 53 Pa. St. 256; *McKibbin* v. *Martin*, 64 Pa. St. 352; *Crawford* v. *Davis*, 99 Pa. St. 576; *Stephens* v. *Gifford*, 137 Pa. St. 219; *Pressel* v. *Bice*, 142 Pa. St. 263; *Garretson* v. *Hackenberg*, 144 Pa. St. 107; *Barlow* v. *Fox*, 203 Pa. St. 114; *White* v. *Gunn*, 205 Pa. St. 229); and it was in the light of these principles that the court below held that, considering the situation of the property and the usages of the business, the transaction in question was valid.

To insure collection of the heavy tax that is laid upon distilled spirits, the production is carefully supervised and the product is impounded. Rev. Stat., §§ 3247–3334, as amended; Act of May 28, 1880, c. 108, 21 Stat. 145; Act of August 27, 1894, c. 349, §§ 48–67, 28 Stat. 509, 563–568: 2 Comp. Stat. U. S. pp. 22 *et seq.* Every dis-

tiller is required to provide, at his own expense, "a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid." This warehouse, when approved by the Commissioner of Internal Revenue, is declared by the statute to be "a bonded warehouse of the United States, to be known as a distillery warehouse," and is "under the direction and control of the collector of the district, and in charge of an internal-revenue store-keeper, assigned thereto by the commissioner" (§ 3271). While the statute provides that "every distillery warehouse shall be in the joint custody of the store-keeper and the proprietor thereof," the control of the Government's representative is made dominant, as in the nature of the case it must be in order to fulfill the purposes of the act. The warehouse, the statute continues, "shall be kept securely locked, and shall at no time be unlocked, or opened, or remain open, unless in the presence of such store-keeper, or other person who may be designated to act for him, as provided by law; and no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the store-keeper and signed by the collector having control of the warehouse" (§ 3274). Under the departmental regulations "the only lock to the warehouse door must be the Government lock, the key of which must at all times be in charge of the store-keeper." There must be an immediate removal of the distilled spirits to the distillery warehouse as soon as they are drawn into casks or packages and gauged, proved and marked, as required, and thereupon the internal revenue gauger "shall, in the presence of the store-keeper of the warehouse, place upon the head of the cask or package an engraved stamp, which shall be signed by the collector of the district and the store-keeper and gauger; and shall have written thereon the number of proof-gallons con-

tained therein, the name of the distiller, the date of the receipt in the warehouse, and the serial number of each cask or package, in progressive order, as the same are received from the distillery" (§ 3287; Act of May 28, 1880, c. 108, § 6). The spirits must be entered for deposit in the warehouse under the regulations prescribed by the commissioner and bond must be given for the payment of the tax. The statute gives the form of the entry which, made in triplicate and duly verified, must set forth the name of the person making it, the designation of the warehouse, the specification of the spirits deposited, with the marks and serial numbers of the packages, etc., and a statement of the amount of tax. Withdrawal may be made on payment of the tax—which is payable within eight years—by application to the collector in charge of the warehouse and the making of a withdrawal entry (§§ 3293, 3294; Act of May 28, 1880, c. 108, §§ 4, 5, 21 Stat. 145; Act of August 27, 1894, c. 349, §49, 28 Stat. 509, 563). Provision is made for regauging and for an allowance for loss from leakage or evaporation (*Id.* § 50, 28 Stat. p. 564; Act of Mar. 3, 1899, c. 435, 30 Stat. 1349; Act of Jan. 13, 1903, c. 134, 32 Stat. 770); and after four years the spirits may be bottled in bond, in a separate portion of the warehouse set apart for that purpose, under the supervision of the government official (Act of March 3, 1897, c. 379, 29 Stat. 626). The storekeeper is to keep "a warehouse-book" in which all deposits and deliveries are to be entered with appropriate description including marks and serial numbers (§ 3301). And the removal "of any distilled spirits from a distillery warehouse . . . in any manner other than is provided by law" is punishable by fine and imprisonment (§ 3296).

The minute regulations of the statute, and the provision for prolonged governmental control, proceed upon a recognition of the exigencies of the business. It is a

matter of common knowledge that the product is not ready to be marketed for consumption when it is drawn from the still. It must undergo an aging process and for this purpose it is kept in store for several years. In laying the tax, Congress has taken this necessity into consideration permitting a long postponement of the required payment, the spirits meanwhile being held in charge of the Government's representative. It is, however, a matter of obvious business importance that the distiller should be able to release the capital represented in the cost of production of the spirits in store and to make it available for further production; and hence the practice is well established to deal with the product in the bonded warehouse by sale or pledge, storage certificates suitably identifying the property being delivered in lieu of the actual transfer of possession. The District Court found as a fact that it is "the unbroken custom of the trade to treat storage receipts for spirits as completely equivalent to the spirits themselves, and to sell or pledge them freely without question." This finding is approved by the Circuit Court of Appeals, and the fact that this custom exists we understand to be undisputed.

It is argued for the appellant that one cannot make himself a warehouseman of his own goods and issue so-called receipts to take the place of the delivery which the law requires to give effect to his sale or pledge (*Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 422; *Bank* v. *Jagode*, 186 Pa. St. 556). The argument ignores the special circumstances of the case and the restrictions imposed by law upon the distiller. The building is his, but the Government is in complete control. The spirits are his, but he is subject to fine and imprisonment if he attempts to remove them. It is undoubtedly true that the Government is not strictly a bailee. It assumes no responsibility to the distiller for the safe-keeping of the goods (*United States* v. *Whitten*, 143 U. S. 76, 78). But the immunity

which is incident to the exercise of governmental power in no way limits its effect upon the distiller's relation to the goods. They are effectually taken out of his power so that he is absolutely unable to make a physical delivery of them until the tax is paid. On the other hand, to pay the tax and remove the property before the aging process is completed would defeat the object of the deposit for which the statute provides, and would frustrate the purpose of a transfer of spirits in bond, which is an entirely lawful transaction. In these circumstances, the certificates—such as were here used—appropriately represent the property.

It is said that the distiller need not use his own warehouse but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. pp. 564, 565). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country with a capacity that is extremely small in comparison with the output of the distilleries. But, aside from this, the distillery warehouse is equally recognized by law; it is "a bonded warehouse of the United States." If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere. And while they are thus deposited in conformity with law he is not debarred from passing title or creating a special interest by way of pledge.

The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Everyone dealing with distillers is familiar with the established practice in accordance with which spirits are held in store,

under governmental control, and are transferred by the delivery of such documents as we have here. There is no warrant for saying that creditors are misled by delusive appearances. The usage serves a fair purpose and there is no public policy which requires that the trade should be thrown into disorder by a refusal to uphold it. It is urged that frauds may be perpetrated by the duplication of such documents; but the present dispute does not call for the determination of the equities as between two innocent purchasers. We are concerned here simply with the rights of creditors represented by a trustee in bankruptcy and we agree with the court below in its conclusion that, in the circumstances disclosed, his right is inferior to that of the appellee.

The decree is affirmed.

Affirmed.